

Back to the Future of ADR: Negotiating Justice and Human Needs*

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In this Article, Professor Sanchez illuminates the ADR project in the context of its historical development in the twentieth-century. Viewing it as a law reform movement designed to improve the capacity of the U.S. legal system to serve both justice and human needs, Professor Sanchez traces the project's philosophical and political underpinnings from the birth of sociological jurisprudence, through New Deal labor relations reform, to its current period of "institutionalization" following the Pound Conference of 1976. She then focuses a critical eye on the influential strands of theory that have shaped ADR pedagogy and practice to the present day and, drawing on interdisciplinary insights and empirical research, proposes a reformative, heuristic framework for fulfilling the twin, historical aspirations of the ADR movement.

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The object of this [work] is to suggest that we seek a way by which desires may interweave, that we seek a method by which the full integrity of the individual shall be one with social progress, that we try to make our daily experience yield for us larger and ever larger spiritual values. The confronting of diverse desires, the thereby revealing of "values," the consequent revaluation of values, a uniting of desires which we welcome above all because it means that the next diversity will emerge on a higher social level—this is progress.***



I. INTRODUCTION

The institutionalization of "alternative dispute resolution" (ADR), as it is presently occurring in the U.S. legal system, is rooted in a long Anglo-American history of resolving disputes on a "dispute processing continuum."¹ That continuum has historically provided litigants with an array of process alternatives for resolving legal disputes peacefully and in a manner that served justice and also satisfied human needs. This Article suggests that a central challenge facing present participants in the ADR movement is to preserve the integrity of that continuum into the future. To that end, the Article traces the seminal, and often disparate, strands of political and intellectual discourse that have shaped the American ADR movement during the past century, and proposes an inter-disciplinary, heuristic framework for understanding and embracing the complexities of that challenge as our legal system adapts to the changes and challenges of the twenty-first century.

The most prevalent, and perhaps primordial, ADR process is negotiation. Its Janus-like quality serves both the transactional and dispute resolution functions necessary to craft settlement outcomes.² In ancient historical contexts, parties can be seen negotiating outcomes that serve justice and their

*** MARY PARKER FOLLETT, *CREATIVE EXPERIENCE* xiv (1924).

¹ See Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 OHIO ST. J. ON DISP. RESOL. 1-39 (1996).

² This phenomenon of the inter-related nature of dispute resolution and deal-making negotiation has been dubbed the "Janus" quality of negotiation—after the Greek God of doorways, whose twin heads are seen carved at the top of stone archways, facing in opposite directions. See Frank E. A. Sander & Jeffrey Z. Rubin, *The Janus Quality of Negotiation: Dealmaking and Dispute Settlement*, 4 NEGOTIATION J. 109-10 (1988).

human needs, with and without the assistance of third-party neutrals.³ Today, this activity is broadly documented on a spectrum of rights and needs-related discourse that includes governmental policy-making,⁴ rulemaking and enforcement,⁵ judicial decisionmaking,⁶ out-of-court and court-annexed

³ See Sanchez, *Towards a History of ADR*, *supra* note 1, at 33–34 (noting that, historically, Anglo-Saxon litigants favored negotiated outcomes over legal judgments). During the earliest period of English legal history, legal documents show disputes being processed on a continuum that called upon arbitrators and judges first to act as third party decisionmakers and then to change hats—as judges often do in modern settlement conferences—serving as mediators who facilitated negotiated outcomes. *Id.* at 3, 38. At that time in English legal history, settlement outcomes were literally called outcomes “at love.” *Id.* at 30–31. By contrast, legal decisions (*i.e.*, those imposed on the parties by third-party decisionmakers acting as judges or arbitrators) were called outcomes “at law.” *Id.* The Anglo-Saxon conceptions of “love” and “law” were not dichotomous. Rather they were “connected and complementary” methods of resolving disputes on the Anglo-Saxon dispute processing continuum. *Id.* The Christian Church, acting in that day and age as both a secular and a religious institution of dispute resolution, facilitated the resolution of disputes at “love” and at “law,” and fostered use of these two forms of peaceful dispute resolution as preferred alternatives to the violent methods of self-help that for so long had been the norm for “settling” social and legal conflicts. *Id.* at 11–12. In cases where the parties were embroiled in interpersonal conflict, Anglo-Saxon judges “frequently promoted settlement agreements”—that is, outcomes “at love” over outcomes “at law.” *Id.* at 27, 30–31. In this secular, but theologically-grounded model of dispute resolution—which predated the secularization of the Christian kingship—altruism was espoused over self-interest for instrumental as well as religious reasons. *Id.* at 14. And in this pre-industrial era, the only “invisible hand” was seen as being that of the Judeo-Christian God, and the only “rational” actor was the man or woman who had faith in, and who feared the wrath of, that God. *Id.* at 22. Only those who continued to cherish pagan rituals, including the blood feud, were seen as defectors from the innovative system of laws and the peaceful methods of dispute resolution that this legal system sanctioned. *Id.* at 14–15.

⁴ In 1958, Herbert Kaufman reviewed well over one hundred detailed case studies of governmental lawmaking and concluded that “the case studies . . . point up the intricate process of negotiation, mutual accommodation, and reconciliation of competing values from which policy decisions emerge and reveal administration as process and as politics . . . These same elements appear in virtually every case regardless of the level of government, the substantive programs, the administrative echelons, and the periods described.” Herbert Kaufman, *The Next Step in Case Studies*, 18 PUB. ADMIN. REV. 52, 52–59 (1958). In 1971, Graham Allison similarly observed that “the decisions and actions of governments are . . . political resultants . . . in the sense that what happens is not chosen as a solution to a problem but rather results from compromise, conflict, and confusion of officials with diverse interests and unequal influence.” GRAHAM ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 162 (1971).

⁵ See, e.g., Negotiated Rulemaking Act of 1990, 5 U.S.C. § 561 (2002) (allowing for negotiated rulemaking as an alternative to the traditional, adversarial rulemaking process in federal administrative agencies); Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 570a–83 (2000) (reauthorizing the Negotiated Rulemaking Act of 1990 and

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ADR processes,⁷ and judicial settlement conferences.⁸ The great extent to which negotiation can and does affect the administration of justice within the

giving private parties affected by governmental agency decisions the right to participate in the “negotiation” of agency rules); Administrative Procedure Act, FLA. STAT. ch. 120.54 (2002) (encouraging negotiated and mediated outcomes as a matter of public policy); *see also* Ann L. MacNaughton, *Collaborative Problem-Solving in Environmental Dispute Resolution*, NAT. RESOURCES & THE ENV'T, Summer 1996, at 3–6 (examining the variety of dispute resolution mechanisms used in environmental dispute resolution); Eric R. Max, *Confidentiality in Environmental Mediation*, 2 N.Y.U. ENVTL. L.J. 210, 211 (1993) (observing that ADR, once “viewed as the exception, . . . has now become the rule” in environmental law enforcement); Tom Melling, *Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card*, 30 LAND & WATER L. REV. 57, 58 (1995) (concerning the Clinton Administration’s “belief that government can facilitate consensus-building and conflict resolution”). *But see* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 677–78 (1986) (pointing to the example of environmental dispute resolution as one arena where such compromises of legal standards routinely occur). *See also infra* Part IV.B.

Another federal example of the institutional preference for negotiating justice and human needs in federal legislation is the Americans with Disabilities Act, which expressly encourages the use of ADR to resolve disputes under the Act. 42 U.S.C. § 12212 (2000) (encouraging use of ADR “to resolve disputes arising under” the Act); *see also* MARTHA A. FIELD & VALERIE A. SANCHEZ, *EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN* 332–38 (1999) (suggesting strategies for bargaining with state service providers to craft parenting support services specifically tailored to meet the special needs of parents with mental retardation within the bounds of the ‘reasonable accommodation’ limitation on remedies available under the Americans with Disabilities Act).

⁶ This negotiation process occurs in the judicial crafting of appropriate remedies as well as in the inter-chambers process of appellate decisionmaking. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1299–1302 (1976) (examining the quasi-negotiation process involved in the remedial phase of public law litigation); Mark Tushnet, *Members of the Warren Court in Judicial Biography: Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763–67 (1995) (providing a rich discussion of the negotiation of justice in the judicial conferences of the Justices at U.S. Supreme Court).

⁷ *See, e.g.*, Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (2002) (requiring federal district courts to develop “civil justice expense and delay reduction” plans); Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651–58 (2002) (amending the Civil Justice Reform Act of 1990 to mandate that all federal district courts develop a minimum of one ADR program). Various state laws authorize court-sponsored ADR programs. *See generally* Ansley Boyd Barton, *ADR in the Georgia Courts*, GA. B. J., Dec. 1998, at 14–19 (documenting the rise of court-connection ADR programs in Georgia); Jona Goldschmidt & Michael A. Hallett, *Balancing Act: Implementing a Statewide, Court-Sponsored ADR Program*, 80 JUDICATURE 222, 229 (1997) (evaluating Arizona’s move towards court-annexed ADR with recommendations based on this

U.S. legal system makes its effective use central to preserving the integrity of the contemporary dispute processing continuum.

The heuristic framework proposed in this Article, therefore, aims at improving the ability of ADR practitioners and judges to help parties negotiate outcomes that serve justice and their human needs. This aim is informed by the sociological vision of law reform that proved to be one of the earliest intellectual strands of the ADR movement. That vision, articulated in the early twentieth century by Harvard Law School Dean, Roscoe Pound, suggested that the contemporary American legal system should "adjust" its principles, doctrines, and institutions of justice from a purely "mechanical," rule-centered approach to one that considered "the human conditions they are to govern . . . putting the human factor in the central place" ⁹ It was a vision that aimed at tempering the "ethic of

evaluation); Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 726 (1994) (discussing Florida's enactment of mediator standards and enforcement proceedings); Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. TEX. L. REV. 541, 542 (1997) (summarizing the policy debates over the confidentiality provisions of Texas's ADR legislation). For a description of these processes, see generally STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 3-6 (3d ed. 1999); Frank E. A. Sander, *Varieties of Dispute Resolution*, 70 F.R.D. 111, 118-27 (1976) (proposing different types of dispute resolution devices depending on the type of dispute, the parties' relationship, the amount in dispute, and the cost and speed of various alternatives).

⁸ There is a rich literature on the subject of judicial settlement conferences as operated by court-employed settlement officers and judges. See, e.g., RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 237-41 (1996) (focusing on the parties' economic incentives to utilize out-of-court settlement, including court-annexed arbitration and the processes the courts use to encourage such private settlement); RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 9-11 (1985) (discussing the weight of the potential costs and outcomes of private arbitration versus litigation); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 512-13 (1985) (noting the trend of courts to use mandated settlement conferences and the pros and cons associated with this trend); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 377-80 (1982) (reexamining the role of judges as case managers as the need to clear the docket through settlement has risen).

⁹ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). In 1906, Pound addressed a meeting of the American Bar Association and suggested that "[t]he most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules[.]" Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 20 J. AM. JUDICATURE SOC'Y 178, 179 (1937). Pound's address "stung . . . the sensibilities of many judges and complacent lawyers" and was described by Dean John Wigmore as "the spark which kindled the flame of progress." *Id.* at Introduction. The following is one of Pound's many representative articulations of his influential vision of legal system reform:

justice” with an “ethic of care,”¹⁰ in keeping with the complementary, dual functions of law and equity that evolved in legal history to make the Anglo-American jurisprudence of dispute resolution “whole,” in theory and practice.¹¹

Let us think of jurisprudence for a moment as a science of social engineering, having to do with that part of the whole field which may be achieved by the ordering of human relations through the action of politically organized society.

Engineering is thought of as a process, as an activity, not merely as a body of knowledge or as a fixed order of construction. It is a doing of things, not a serving as passive instruments through which mathematical formulas and mechanical laws realize themselves in the eternally appointed way. The engineer is judged by what he does. His work is judged by its adequacy to the purposes for which it is done, not by its conformity to some ideal form of a traditional plan We are coming to study the legal order instead of debating as to the nature of law. We are thinking of interests, claims, demands, not of rights; of what we have to secure or satisfy, not exclusively of the institutions by which we have sought to secure or to satisfy them, as if those institutions were ultimate things existing for themselves. We are thinking of how far we do what is before us to be done, not merely of how we do it; of how the system works, not merely of its systematic perfection. Thus more and more we have been coming to think in terms of the legal order—of the process—not in terms of the law—the body of formulated experience or system of ordering—to think of the activity of adjusting relations or harmonizing and reconciling claims and demands, not of the adjustment itself and of the harmonizing or reconciling itself as a system in which the facts of life mechanically arrange themselves of logical necessity. Such a change of attitude is manifest among all types of jurists in the present century. It may be illustrated by merely enumerating the six points which are urging in the juristic literature of the day: study of the actual social effects of legal institutions and legal doctrines, study of the means of making legal rules effective, sociological study in preparation for lawmaking, study of juridical method, a sociological legal history, and the importance of reasonable and just solutions of individual cases, where the last generation was content with the abstract justice of abstract rules.

ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 152–53 (1923).

¹⁰ For a contemporary, gender-based analysis of the ethic of justice and the ethic of care in moral decisionmaking, associating the former with male moral reasoning and the latter with female moral reasoning, *see generally* CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 64–105 (1982); *see also infra* Part II.B.

¹¹ During the Anglo-Saxon period of English legal history, prior to the Norman Conquest in 1066, the Judeo-Christian conception of “justice” as an “ethic of care” informed and shaped the development of a dispute processing continuum which fostered the parties’ resort to legal process and their “reconciliation” through settlement outcomes. *See generally* Sanchez, *Towards a History of ADR*, *supra* note 1, at 12–14. After the Norman Conquest, this system of resolving legal disputes became increasingly formalized. *Id.* at 32. During the early common law era a litigant could not obtain legal

The goal of this Article, therefore, is ultimately to help “make whole” our society’s image of ADR and its practice as a complementary part of the U.S. system for resolving legal disputes in a manner that serves justice *and* human needs.¹² The primary component of this vision, and the central focus of the heuristic framework discussed in this Article, is seen as coming “from below,” through improved approaches to ADR practice and process design.¹³ Its secondary component, necessitated by the institutionalization of ADR processes within courts, regulatory schemes, and systems of substantive law, will come “from above,” through an array of legal reforms designed to correct flaws in institutionalized versions of ADR that perpetuate injustice, fail adequately to redress it, or serve to subvert rules of law.¹⁴

relief if his claim did not fit within the prescribed confines of rigid forms of legal action, and common law judges did not enjoy discretionary powers to grant relief outside the framework of this writ system. Only the king and his council could grant such “extraordinary” relief. Eventually, the king and his council delegated this task to the Chancellor of the Exchequer and over the course of the fifteenth and sixteenth centuries principles of equity were created to correct the injustices of the common law rules resulting in the institutionalization of a system of “Equity” in the English legal system. *See generally* WILLIAM HAMILTON BRYSON, *THE EQUITY SIDE OF THE EXCHEQUER: ITS JURISDICTION, ADMINISTRATION, PROCEDURES AND RECORDS* 1–8 (1975) (discussing the general history of the equity jurisdiction of the Court of Exchequer); HENRY HORWITZ, *CHANCERY EQUITY RECORDS AND PROCEEDINGS, 1600–1800: A GUIDE TO DOCUMENTS IN THE PUBLIC RECORD OFFICE* 6 (1995) (using the Chancery’s records to analyze the process, scope and types of litigants who utilized this system); A. H. MARSH, *HISTORY OF THE COURT OF CHANCERY AND OF THE RISE AND DEVELOPMENT OF THE DOCTRINES OF EQUITY* (1890); *see also* JONATHAN M. LANDERS & JAMES A. MARTIN, *CIVIL PROCEDURE* 345–53 (1981) (describing the nature, scope, doctrines and procedures of equity in historical and modern contexts). In England, the Judicature Act of 1873 merged law and equity. In the United States this merger began on a state-by-state basis with the unwieldy Field Code, drafted by David Dudley Field, and first adopted in New York in 1848. *See id.* at 454–55. *See also* WILLIAM SEAGLE, *LAW: THE SCIENCE OF INEFFICIENCY* 49–56 (1952) (concerning lawyer’s struggle with complicated pleadings and Field Code practices). By 1938, the federal merger of law and equity was accomplished by the Federal Rules of Civil Procedure which also simplified pleadings and institutionalized numerous other procedural reforms of the adjudication process. *See* ARTHUR T. VANDERBILT, *THE CHALLENGE OF LAW REFORM* 6–9, 36 (1955); *see also* 2 MELVIN M. BELLI, *THE LAW REVOLT: A SUMMARY OF TRENDS IN MODERN CRIMINAL AND CIVIL LAW* 606–10 (1968) (noting the importance of code pleading in terms of its history as applicable to today’s common law pleading system).

¹² *See Sanchez, Towards a History of ADR, supra* note 1, at 35–39 (discussing the possible role of ADR and the multi-door courthouse idea in broadening the American conception of law and adversarial legal process to include the ethic of reconciliation).

¹³ For a historical discussion of dispute processing “from below” and “from above,” *see id.* at 10–12.

¹⁴ As Marc Galanter and Mia Cahill have observed,

II. LOOKING BACK: HISTORY, THEORY, AND PRACTICE

It is widely accepted that the “main stimuli” for the ADR movement was “largely pragmatic and political rather than theoretical or ‘scientific.’”¹⁵ Yet both theory and practice played important roles in the evolving ideas and policies associated with the institutionalization of ADR during the twentieth century. The institutionalization of late nineteenth and early twentieth century American “experiments” with ADR processes culminated first with the passage of the Federal Arbitration Act of 1925, providing for the enforcement of contractual agreements to arbitrate disputes arising from

[T]he bargaining endowments produced by the legal rules are not self-implementing. They are translated into outcomes by the features of the particular bargaining arena. Many features of the arena offer possibilities for policy intervention: the skills and styles of the negotiators; the ethical constraints under which they operate; the presence of mediators or other settlement facilitators; the review of negotiation results by third parties (as, for example, in judicial hearings to determine the fairness of settlements in class action lawsuits and in cases involving minors); and requirements about publicity and disclosure.

How do alterations in these features affect the costs of the settlement process? How do they affect the distribution of the “savings” produced by the settlement? How do they affect the “general effects” or “public goods” produced by settlement? Are settlements in a particular arena improved by detaching them from adjudication—for example, by removing them into different institutions or setting up cost barriers against recourse to de novo adjudication? Or is it better to couple them more closely with adjudication, for example by summary jury trials before the fact or fairness hearings afterward?

Even though we don’t know the answers to these questions, the fact that we ask them reflects a change in our understanding of the relation of the courts to civil justice that has profound implications for policy. Once courts were envisioned as dedicated exclusively to adjudication, so that settlement was seen as the product of a consensual private departure from the public forum But now it is common knowledge that most remedy seeking in the vicinity of courts is going to eventuate in settlement *Once we see settlements not as a stray byproduct of the judicial process, but as part of the essential core, the responsibilities of courts can no longer be defined as coextensive with adjudication. Once we apprehend the multiplex connection between court and settlement, ensuring the quality of these processes and the settlements they produce is a central task of the administration of justice.*

Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1390–91 (1994) (emphasis added).

¹⁵ William Twining, *Alternative to What?: Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics*, 56 MOD. L. REV. 380, 380 (1993).

maritime and interstate commerce transactions,¹⁶ and then with the labor relations reforms of the New Deal era, institutionalizing a full array of ADR practices in private-sector labor-management relations and developing a regulatory scheme for overseeing those practices.¹⁷ These reforms were preceded and followed by overlapping theories of conflict and bargaining behavior germane to the negotiation process in both business transactions and dispute-related contexts. The political and ideological underpinnings of these reforms were rooted in the theories of law reform first articulated by Roscoe Pound and his contemporary, Mary Parker Follett, a prominent business consultant, theorist, and social reformer from Boston.

¹⁶ See The Federal Arbitration Act of 1925 (originally called the United States Arbitration Law), 9 U.S.C. §§ 1–307 (2002). That law was patterned after the Arbitration Law of New York, Laws 1920, ch. 275 (amended 1921); see also JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 57–68 (1983) (discussing the evolution of commercial arbitration as a product of the post-Civil War movement toward industrial self-government); KATHERINE V.W. STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* 308–13 (2000); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 269 (1926) (describing how the Federal Arbitration Act served to circumvent delays associated with law, equity, and admiralty, save parties the cost of litigation, and result in outcomes regarded by the business world as more just than outcomes reached by judges).

¹⁷ The Congressional preference for use of ADR to resolve labor disputes dates back over a century to the passage of the Arbitration Act of 1888 (providing for voluntary mediation and compulsory fact-finding in railway labor disputes). It recurred subsequently in the Erdman Act of 1898 (providing for the mediation and voluntary arbitration of railway labor disputes), the Newlands Act of 1913 (creating a Board of Mediation and Conciliation to resolve railway labor disputes), the Railway Labor Act of 1926, 45 U.S.C. §§ 151–88 (2002) (creating the National Mediation Board to resolve disputes arising under railway collective bargaining agreements through mediation and arbitration), and culminated in the National Labor Relations Act (hereinafter "NLRA" or "Wagner Act") of 1935, 29 U.S.C. §§ 151–69 (2002) (creating the National Labor Relations Board, one function of which was to appoint mediators and conciliators to help resolve private sector labor disputes governed by the Act). This lasting institutionalization of the government's preference for use of ADR in labor relations was articulated by Congress in Title II of the Labor Management Relations Act (Taft-Hartley Act) of 1947:

It is the policy of the United States that . . . the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements . . . and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes[.]

29 U.S.C. § 171(b) (2002); see WALTER E. OBERER ET AL., *LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* 88–90 (5th ed. 2002).

During the 1950s, 1960s, and 1970s, the idea of using ADR processes more broadly to resolve legal disputes progressively took hold of the imagination of American lawyers, legal scholars, and court reformers as a result of three predominant concerns: overloaded court dockets causing litigants expense and delay; the need for specialized private fora for resolving disputes such as those involving commercial matters; and concerns that "the system was incapable in more fundamental ways of living up to the ideals of 'access to justice' for all."¹⁸ During this early period of the ADR movement, practitioners from the field of labor relations played a central role in many of the grass roots efforts to organize dispute resolution professionals.¹⁹

By 1976, Roscoe Pound's influential theory of sociological law reform took on new life as U. S. Supreme Court Chief Justice Warren Burger called for the institutionalization of ADR within the U.S. legal system²⁰ at the influential conference on justice reform bearing Pound's name.²¹ At the same conference, Harvard Law School Professor Frank E. A. Sander, proposed the

¹⁸ Twining, *supra* note 15, at 380–82; *see, e.g.*, JOHN P. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* 13 (1969) (lectures on the dedication of the Earl Warren Law Center, University of California); SEAGLE, *supra* note 11, at 56; VANDERBILT, *supra* note 11, at 9–11 (1955); Report of the Special Judicial Reform Committee, Superior Court of Los Angeles County iii, 20–21, 24 (February 1971).

¹⁹ As expressed by Edward Hartfield, past president of the Society of Professionals in Dispute Resolution ("SPIDR"):

The core of labor-management practitioners that was instrumental in starting SPIDR, is now concerned that their issues and agenda are lost in the explosion of ADR programs and developments. The ADR projects and program are busy promoting their own areas of specialization, and often don't relate well to each other or to the labor mediators, and sometimes attempt to protect their areas of practice by creating overly restrictive requirements for entry into their fields. All sides are left with the feeling that they have little in common.

Edward F. Hartfield, *Presidential Address: The Unified Theory of Dispute Resolution*, in *DISPUTE RESOLUTION AND DEMOCRACY IN THE 1990S: SHAPING THE AGENDA* 1–12 (17th Annual International Conference, Society of Professionals in Dispute Resolution, Oct. 19–22, 1989).

²⁰ *See* Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 93–96 (1976) (suggesting alternatives to litigation); *see also* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276–81 (1982) (advocating assessment of alternatives to litigation).

²¹ *See generally* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (Leo Levin & Russell Wheeler eds., 1979); Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79–246 (1976) (discussing the current problems and trends affecting the courts, especially in terms of caseload and alternative means to adjudicate effectively and efficiently). *Cf.* POUND, *CAUSES OF POPULAR DISSATISFACTION*, *supra* note 9, at 4.

development of a multi-door courthouse paradigm that would effectively create a dispute processing continuum within the framework of the U.S. Court system, giving parties an array of process options for resolving legal disputes.²² Subsequently, the ADR "movement" began to take hold of the legal profession, leading to widespread court reform and the development within law schools of courses germane to the practice of ADR.²³ During the process of developing ADR pedagogy, legal academicians drew upon theories of bargaining first articulated during Pound's era. These theories have remained highly influential in shaping the institutionalization of ADR in legal academia over the past quarter century. This section of the present Article discusses the strata of political and intellectual discourse that serve as bedrock for the continued evolution of ADR theories and practices, including the heuristic framework for negotiating justice and human needs set forth in Part III.

²² See generally FRANK E. A. SANDER, *THE MULTI-DOOR COURTHOUSE: SETTLING DISPUTES IN THE YEAR 2000* (1976); Larry Ray & Anne L. Clare, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future . . . Today*, 1 OHIO ST. J. ON DISP. RESOL. 7, 9–16 (1985) (discussing implementation of Professor Sander's idea); Sanchez, *Towards a History of ADR*, *supra* note 1, at 5 n.6, 35–38 (drawing historical analogies between the multi-door courthouse idea and the concept of the dispute processing continuum set forth in the article); Frank E. A. Sander, *Dispute Resolution Within and Outside the Courts—An Overview of the U.S. Experiment*, at 1 n.2, 9–10 (April 1990) (unpublished manuscript, on file with the author) (describing the multi-door courthouse as a comprehensive justice center with multiple doors labeled, for example, "mediation," "arbitration," "mini-trial," and "courtroom"); Sander, *supra* note 7, at 111–34; see also Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 324 (1996) (stating that "despite some troubling aspects of its lineage, Professor Sander's multi-door courthouse proposal continues to hold considerable attraction.").

²³ In 1983, Derek Bok, former Dean of Harvard Law School and then President of Harvard University, called for ADR-related reforms in legal practice and the development of ADR pedagogy in legal academia. See, e.g., Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 570–85 (1983) (noting the role of the Legal Services Corporation as a means of reducing the cost of litigation as a means of court reform and calling for law schools to educate and experiment toward these ends); see also Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613, 1615–24 (1997) (making brief mention of law school courses and programs on negotiation developed since the Pound Conference). Within the next two years the classic law school textbook in the field of ADR was spearheaded by Harvard Law School Professor Frank E. A. Sander and colleagues. See generally STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (1st ed. 1985).

A. Theories of Labor Relations and ADR: Paternalism Versus Free Choice

The Wagner Act of 1935 represents a legislative watershed in the legal reform movement that led up to the institutionalization of ADR within the U.S. legal system after the Pound Conference of 1976.²⁴ The Act sanctioned collective bargaining and institutionalized a “dispute processing continuum” in private sector labor relations to which management must resort during the life of a collective bargaining agreement as a *quid pro quo* for labor’s agreement not to strike.²⁵ The purpose of the continuum was to effect the

²⁴ See generally NLRA, *supra* note 17; *The Pound Conference*, *supra* note 21, at 161.

²⁵ See NLRA, *supra* note 17, at §§ 157, 158(a)(5), 158(b)(3), 158(d), 159(a) (as codified at 29 U.S.C.); see also *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957) (“Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike.”) (emphasis in original). The NLRA declared the federal policy of promoting the rights of private sector employees to organize and bargain collectively with employers, and also created a statutory right to strike. See NLRA, 29 U.S.C. §§ 157, 158(a), 163. This legal regime legitimates private sector employees’ use of “economic weapons” and the threat of their use to motivate their employers to resolve bargaining impasses. But while the Wagner Act expressly permits use of the strike by private sector employees, the Supreme Court has empowered management with countervailing weapons of self help. The Court has interpreted the Act to allow private sector employers to defend themselves against injury caused by labor strikes by permitting management to replace the strikers, filling their jobs temporarily or permanently. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938). The Court has also read the Act to empower private sector employees with offensive weaponry by legitimating “lock-outs” to keep bargaining-unit employees off their premises. See *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965). A rich literature exists on the effect of these rulings on the respective bargaining endowments of labor and management. See, e.g., George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, PROC. N.Y.U. 43D ANN. NAT’L CONF. ON LAB. 109 (1990); Samuel Estreicher, *Strikers and Replacements*, 3 LAB. LAW. 897 (1987); Matthew W. Finkin, *Labor Policy and the Elevation of the Economic Strike*, 1990 U. ILL. L. REV. 547; Walter Kamiat, *Strikers and Replacements: A Labor Union Perspective*, PROC. N.Y.U. 43D ANN. NAT’L CONF. ON LAB. 23 (1990); Katherine Van Wezel Stone, *Legal Regulation of Economic Weapons: A Comparative Perspective*, PROC. N.Y.U. 43D ANN. NAT’L CONF. ON LAB. 79 (1990); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984); William C. Zifchak, *Strikers, Replacements, and S. 2112: Full Employment Law for Organized Labor?*, PROC. N.Y.U. 43D ANN. NAT’L CONF. ON LAB. 53 (1990).

The NLRB does not apply to public sector employees and there exists no other source of federal law empowering public employees to organize, engage in collective

peaceful and expeditious resolution of labor disputes through negotiation, grievance mediation, and, if necessary, through resort to grievance arbitration, with the possibility of review by the National Labor Relations Board (NLRB) or a federal court.²⁶ This labor relations “dispute processing continuum” (similar to its historical analogue in the Anglo-Saxon era of English legal history) aimed at averting violent methods of self-help, *i.e.*, the

bargaining, or strike. Though President Franklin Delano Roosevelt signed the Wagner Act, he spoke out vociferously against extending the right to strike to employees in the public sector, likening this form of industrial self-help to “militancy”:

[M]ilitant tactics have no place in the functions of any organization of Government employees A strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.

Norwalk Teachers’ Ass’n v. Bd. of Educ., 83 A.2d 482, 484 (Conn. 1951) (quoting letter from Franklin Roosevelt to the president of the National Federation of Federal Employees, Aug. 16, 1937) (alteration in original).

Today, the rights of employees in the public sector to organize, engage in collective bargaining, and strike are governed by state law. Since the 1970s, just over a majority of the states have passed laws that extend these rights to public employees. See DONALD H. WOLLETT ET AL., *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 8–11 (4th ed. 1993); Martin H. Malin, *Public Employees’ Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 316–17 (1993):

Impasses in collective bargaining are inevitable. Accordingly, jurisdictions that provide for public employee collective bargaining have developed three approaches to resolving such impasses. The first approach relies on the threat or actual use of economic weapons, primarily the strike or lockout, to motivate the parties to reach agreement. The second approach prohibits strikes, but provides for fact-finding in the event of impasse. The third approach provides that the parties submit unresolved impasses to binding arbitration.

²⁶ See Calvin William Sharpe, *Introduction (An Oral History of the National War Labor Board and Critical Issues in the Development of Modern Grievance Arbitration)*, 39 CASE W. RES. L. REV. 505, 505–07 (1989) (“Today, grievance arbitration is the cornerstone of dispute resolution under collective bargaining agreements The modern grievance arbitration case is at the pinnacle of a pyramid of procedures that encourage pre-arbitral, bilateral settlements. Failing early resolution, the parties typically prepare testimonial and documentary evidence for a hearing before the arbitrator.”).

industrial strike with its attendant risk of violence²⁷ and harmful economic consequences for labor, management, and society at large.²⁸

The Wagner Act thus legislated a system of rules for governing labor-management relations designed to strike a balance between governmental

²⁷ Labor strikes often led to violent clashes between picketers and professional ruffians hired by management to break up strikes. See Robert M. Lombardo, *The Genesis of Organized Crime in Chicago*, Illinois Police and Sheriff's News, at 18–19, available at <http://www.ipsn.org/genesis.htm> (last visited Mar. 5, 2003).

²⁸ See Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 997–99 (1984); see also *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 566 (1960):

Section 203(d) of the Labor Management Relations Act . . . [also called the Taft-Hartley Act] states, "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement" *Id.* That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.

Id.; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578–79 (1960):

The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement. [In the commercial context] . . . the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. . . . The collective [bargaining] agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.

Id. at 577–79 (citations and footnotes omitted); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597, 599 (1960):

It is the arbitrator's construction [of the terms of collective bargaining agreement] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem [H]e does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id.

paternalism and individual free choice; the tripartite framework of the dispute processing continuum created a role for a governmental agency designed to protect the interests of labor and management, while leaving the principals free to adjust their competing interests in a cooperative manner.²⁹ To this end, Senator Robert Wagner envisioned that the negotiation process involved in collective bargaining would be a broad, relatively unregulated zone for open-ended, deal-making discourse that would "privilege[] the distributional contest between labor and management over efficiency maximization . . . [and] be nurtured by institutional structures cleansed of excessive power disparities" though still susceptible to "strategic problems" produced by "cultural and psychic conflict over legitimacy, trust, and resistance."³⁰ In creating a relatively "level" playing field on which the "collective bargaining game" could occur, Wagner envisioned a largely unregulated negotiation process in which the competitive instinct of each side could play itself out within the parameters of a "cooperative process," leaving each side free to test the other's credibility, conflict with it over distributive issues, and reach agreement or not as a result of the way the cooperative/competitive dynamic played out. By sanctioning collective bargaining in this manner, Wagner aimed at integrating the historically polarized interests of labor and management and at counteracting, or at least legitimating, their "asymmetric power relations" by leaving labor free to exercise strategic bargaining behaviors that might work to increase their bargaining endowment in relation to management.³¹

Wagner's belief that constructive labor-management discourse would serve justice and human needs was compatible with the influential ideals of Mary Parker Follett, who actively exchanged views with Roscoe Pound and other advocates of law reform. Writing in the early twentieth century, prior to the passage of the Wagner Act, Follett suggested that labor-management conflict (which occurred with frequency and was often accompanied by violence and bloodshed before the passage of the Wagner Act) would best be resolved through "integration." Follett saw "integration" as a process for resolving disputes in a manner that yielded substantial benefits to both sides "in the form of a 'win-win' outcome."³² This process was different from the

²⁹ The legislative struggle to win passage of the Wagner Act has been characterized as a "crusade to build a cooperative social democracy." Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1381 (1993).

³⁰ *Id.* at 1392.

³¹ *Id.* at 1390, 1420.

³² IRVING H. SIEGEL & EDGAR WEINBERG, LABOR-MANAGEMENT COOPERATION: THE AMERICAN EXPERIENCE 13-14 (1982) (citing Mary Parker Follett, *The Psychological Foundations: Constructive Conflict*, in SCIENTIFIC FOUNDATIONS OF BUSINESS

two approaches to dispute resolution that Follett observed in her study of the legal system and of labor-management disputes: (1) "domination" by third-party decisionmakers (*i.e.*, court orders *qua* the Hobbesian conception of centralized authority) and; (2) "compromise outcomes" (*i.e.*, split the difference settlements reached by the parties themselves). Follett was critical of the predominantly distributive focus of both alternatives to integration because she saw each as overshadowing the creative dynamic that she believed conflict could inspire.

In Follett's view, the "creative dynamic" of conflict, if handled integratively, could work to unify disputants in a joint struggle to communicate beyond the "destructive dynamic" caused by their differences, enabling each to see aspects of the other's positions as "complementary" in relation to each other, and therefore as potentially unifying. The visual depiction of the Yin and Yang in dualistic Chinese philosophy provides an image of such a complementary unification of "difference." As illustrated in Figure 1, Yin and Yang symbolize the complementary, cosmic elements of the sun and the moon, respectively, which are seen as naturally co-existing in a three-dimensional world where they are always in balance, yet always in motion in relation to each other as they interact in a continual cycle of synergistic change.³³

ADMINISTRATION 114-31 (H. C. Metcalf ed., 1926)). See also Eileen Stewart, *Mary Parker Follett in Her Own Words*, in DISPUTE RESOLUTION AND DEMOCRACY IN THE 1990S: SHAPING THE AGENDA 107-13 (17th Annual International Conference, Society of Professionals in Dispute Resolution, Oct. 19-22, 1989) (proposing a theory of integrative bargaining as "coactive power, the enrichment and advancement of every soul").

³³ In Chinese dualistic philosophy, the "yin" is seen as the "passive, female cosmic element, force, or principle, that is opposite but always complementary to the 'yang, . . . [characterized as] the active, masculine cosmic principle.'" *Yin*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (William Morris ed., Houghton Mifflin 1976). The cosmic imagery associated with these twin elements of the universe are the moon (Yin) and the sun (Yang), with the moon denoting shade and femininity and the sun denoting brightness and masculinity. To carry forward what many modernists would consider to be an anachronistic gender-based imagery for the forces of the cosmos, the Yin can be seen as corresponding to impulses toward cooperativeness and the Yang as corresponding to impulses toward competitiveness. Just as the heterogeneity of the human (and many other species) is essential to its survival, so is the heterogeneity of "shade" and "sun" that is the result of the complementary cycles of the moon and sun, necessary to the survival of life on earth as we know it. Similar to the arguable inevitability of the cosmic balance facilitated by the heterogeneous forces of the Yin and the Yang, of the moon and the sun, of the female and the male, the "natural" bargaining process is composed of the dualistic forces of cooperativeness and competitiveness. See generally CHARLES-JAMES N. BAILEY, ON THE YIN AND YANG NATURE OF LANGUAGE (1982); NANCY FOY, THE YIN AND YANG OF ORGANIZATIONS (1980); A. C. GRAHAM,

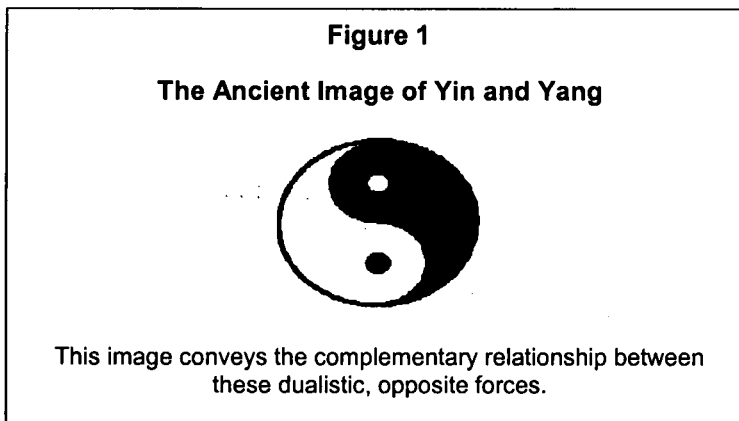


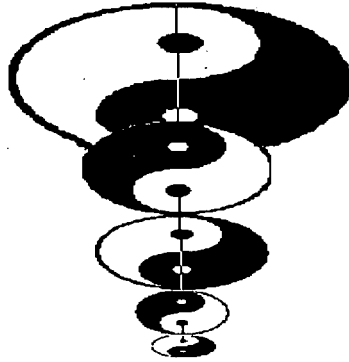
Figure 2 illustrates the interactive synergism between Yin and Yang, and also provides a visual model of the creative dynamic of conflict—where the impulses to cooperate and compete can ultimately work together in a complementary fashion to make each party “whole” in relation to the other party. This is the vision of conflict and its resolution (and of competition and cooperation) that informed the theories and political values of Roscoe Pound, Mary Parker Follett, and Senator Wagner.³⁴ It is also the vision that informs the heuristic framework of ADR theory and practice set forth in this Article.

YIN-YANG AND THE NATURE OF CORRELATIVE THINKING (1986); CHRISTOPHER MARKERT, *YIN, YANG: POLARITÄT UND HARMONIE IN UNISEREM LEBEN* (1983); JEAN MAROLLEAU, *LA SYMBOLIQUE CHINOISE* (1978). The image of the Yin and the Yang also corresponds, philosophically, to the complementary, though seemingly dichotomous, notions of resolving disputes at “love” and at “law” on the Anglo-Saxon dispute processing continuum. See Sanchez, *Towards a History of ADR*, *supra* note 1, at 31; see also *supra* text accompanying note 3.

³⁴ One common critique of the Wagner Act and its progeny is that the statutory regime imposed on the field of industrial and labor relations produced an artificial balance between competitiveness and cooperativeness. At the core of this assertion is that the Act empowered labor at the expense of the free market. See, e.g., Posner, *Some Economics of Labor Law*, *supra* note 28, at 990 (stating that “labor law is . . . founded on a policy that is the opposite of the policies of competition and economic efficiency that most economists support . . .”). A related claim is that the vision of labor relations that gave rise to, and that is fostered by, the Act is decidedly cooperative. See, e.g., Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1667 (1983) (questioning the court’s assumption in the influential case, *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 167 (7th Cir. 1955), that “the principle purpose of the Act . . . is cooperation between management and labor”). Whether labor laws, court decisions interpreting them, and innovations by management and labor that have the effect of transcending or averting the historical struggle between labor and management are

Figure 2

The Interactive Dynamic Between Yin and Yang



This image depicts the dynamic, intertwining, interaction between Yin and Yang. The interaction starts at the core of the global sphere and expands outward around the shared axis connecting the opposite poles. The interactive process works synergistically to fill the relational sphere in a perpetual cycle of creative destruction.

Follett's theoretical vision of negotiation as an interactive process leading to "integration" of different and shared interests served as the basis for subsequent theories of bargaining behavior. One of the most influential of these early theories was also drawn from the authors' observation and study of negotiation in the context of labor-management relations. In 1965, Richard Walton and Robert McKersie published their classic book, *A Behavioral Theory of Labor Negotiations*.³⁵ It presented a conceptual framework for

consistent with the vision of American labor relations espoused by Senator Wagner and his adherents is the subject of a larger work. See VALERIE A. SANCHEZ, *NEGOTIATING THE 21ST CENTURY: FROM ROUNDTABLE TO GLOBALIZATION* (book-in-progress) (on file with the author).

³⁵ During the past three decades, academics observing developments in the field of industrial and labor relations began to use the terms *distributive* and *integrative* bargaining, and subsequently models based on those terms, for describing and analyzing the strategic interactions of labor and management negotiators in collective bargaining contexts. See RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* (2d ed. 1991). This seminal work produced a paradigm shift, moving the study of industrial relations and collective bargaining "from its institutional-historical school and opened up the field

identifying “systems of activities” in the labor-management bargaining process. The first system, or “hypothetical construct,” described by Walton and McKersie was *distributive bargaining*, defined as “the complex system of activities instrumental to the attainment of one party’s goals when they are in basic conflict with those of the other party.”³⁶ The second system, expressly adapted from Follett’s view and that of her successors-in-theory, was *integrative bargaining*, defined as activities such as “identify[ing], enlarg[ing], and act[ing] upon the . . . interests of the parties [that are] instrumental to the attainment of objectives which are not in fundamental conflict with those of the other party and which therefore can be integrated to some degree.”³⁷ The third system, *attitudinal structuring*,³⁸ was “a

to the work of social science [introducing] countless social and behavioral scientists from other disciplines and fields of study to the world of labor negotiations.” Thomas A. Kochan, *Forward*, in WALTON & MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS, *id.* at ix; *see also*, NEIL W. CHAMBERLAIN & JAMES W. KUHN, COLLECTIVE BARGAINING 422–39 (2d ed. 1965) (suggesting that labor-management negotiations should progress from a process of “conjunctive bargaining” rooted in competition, to “cooperative bargaining,” seeking the “fuller exploitation of the special contribution which each party can make to an improved performance”).

³⁶ WALTON & MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS, *supra* note 35, at 4. Distributive bargaining activities are competitive in nature, reflect situations of “pure conflict,” and are evident when parties’ moves are intended to “influence the division of limited resources.” *Id.* at xv.

³⁷ *Id.* at 5, 7 (citing DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT (Henry C. Metcalf & L. Urwick eds., 1940)); *see also* S. H. SLICHTER ET AL., THE IMPACT OF COLLECTIVE BARGAINING IN MANAGEMENT (1960) (an empirical study of integrative bargaining in several collective bargaining contexts); THE CIP COMMITTEE OF THE NATIONAL PLANNING ASSOCIATION, CAUSES OF INDUSTRIAL PEACE UNDER COLLECTIVE BARGAINING (Clinton S. Golden & Virginia D. Parker eds., 1960) (groundbreaking study of successful approaches to integrative bargaining); *infra* notes 217–18 (discussing the economic terms “value,” “evaluation,” “exchange,” and “value creation”).

³⁸ *Id.* The other factor, which follows attitudinal structuring as the fourth “subprocess” in the Walton and McKersie analytic framework is “intraorganizational bargaining.” This process is most germane to principal-agent negotiation contexts, such as labor-management relations where a designated team of negotiators represents each side. It refers to “the system of activities which brings the expectations of principals into alignment with those of the chief negotiators.” *Id.* While consideration of principal-agent issues is important to understanding and analyzing the bargaining dynamic, it is not a central focus of the present article. However, there is a growing literature on the subject. *See, e.g.*, ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 69–91 (2000); *see generally* NEGOTIATING ON BEHALF OF OTHERS: ADVICE TO LAWYERS, BUSINESS EXECUTIVES, SPORTS AGENTS, DIPLOMATS, POLITICIANS, AND EVERYBODY ELSE (Robert H. Mnookin & Lawrence E. Susskind eds., 1999) (essays offering multi-contextual prescriptive advice based on anecdotal and some quasi-empirical analysis of principal-agent dynamics in negotiation); Ronald J. Gilson &

socioemotional process designed to change attitudes and relationships . . . such as friendliness-hostility, trust, respect, and the motivational orientation of competitiveness-cooperativeness . . . [that are] instrumental to the attainment of desired relationship patterns between the parties.”³⁹

Because most real-world negotiations in the framework of American labor relations involve more “free choice” by the parties than governmental “paternalism,” they involve “significant elements of conflict and [also] considerable potential for integration.”⁴⁰ Theoretically, Walton and McKersie describe this state of affairs as involving a *mixed bargaining* dynamic of distributive and integrative behaviors. This *mixed bargaining* dynamic is also generally descriptive of most real-world negotiations. As a result, the *mixed bargaining* paradigm has become bedrock in the theoretical and practical scholarship associated with ADR pedagogy.⁴¹ Negotiation scholars now commonly use two-dimensional graphs to depict the different outcomes that may result from the competitive-cooperative *mixed bargaining* dynamic on “utility frontiers.”⁴² Outcomes that utilize all available resources are considered optimally efficient, regardless of how equally the parties

Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Negotiation*, 94 COLUM. L. REV. 509, 509 (1994).

³⁹ WALTON & MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS, *supra* note 35, at 5. This system of activities, unlike the first two, does not involve joint decisionmaking by the parties. Also, it influences the relationship patterns between the parties against the backdrop of “more enduring forces (such as the technical and economic context, the basic personality dispositions of key participants, and the social belief systems which pervade the two parties).” *Id.*

⁴⁰ *Id.* at 161–62.

⁴¹ See, e.g., ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce M. Patton ed., 1981); DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATIVE AND COMPETITIVE GAIN (1986); MNOOKIN, ET AL., *supra* note 38, at 9, 11–43; HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION: HOW TO RESOLVE CONFLICTS AND GET THE BEST OUT OF BARGAINING (1982); GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983).

⁴² The utility frontiers measure parties’ level of satisfaction with outcomes reached in the negotiation. See, e.g., WALTON & MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS, *supra* note 35, at 24–25, 162 (discussing utilities and utility frontiers drawn from the underlying assumptions of distributive, integrative and mixed bargaining models: the distributive model assumes low or no variability in the sum available for distribution to the parties; the integrative model assumes “no problem in allocating shares between them;” and mixed bargaining model “assumes and confronts both [process] possibilities and recognizes that they are interdependent”).

distribute the resources among them. Economists have named that place on the theoretical, bi-linear graph, the "Pareto efficient" or "Pareto optimal" frontier, after the economist who propounded the theory, Vilfredo Pareto.⁴³

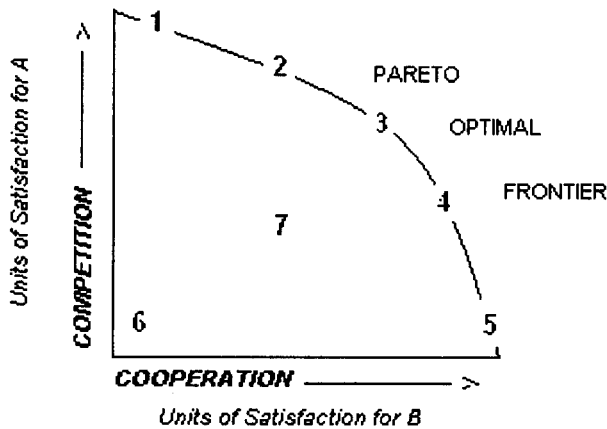
The concept of "Pareto optimality" when used by ADR theorists in the context of dispute resolution or deal-making negotiations, therefore, refers to agreements that utilize all of the resources that are available to the parties for joint allocation. Figure 3 represents a number of possible outcomes resulting from a *mixed bargaining* dynamic: competitive (distributive) and cooperative (integrative) behaviors are depicted as diverging, or moving away from their shared point of origin on the bi-linear graph. On Figure 3, those directional lines also correspond to the two parties involved in the hypothetical, bi-lateral negotiation (*i.e.*, Negotiators A and B, respectively). Theorists plot the outcomes associated with this mixed bargaining utility frontier to envision, measure and compare the quality or "utility" of the relative outcomes in relation to the symmetry or asymmetry of a negotiator's bargaining behaviors. However, these types of two-dimensional graphs can also have the visual and conceptual effect of casting as "opposing," or "in tension," the bargaining behaviors and entities that are represented on each of the directional lines, or axes, that frame the utility frontier.⁴⁴

⁴³ Pareto suggested that the place of optimal utility is reached when any change in the allocation of available resources would result in a necessary gain by one party and a loss to the other. If resources can still be allocated without this consequence (*i.e.*, that one party can realize a gain, without it costing the other party resources he already has) the parties have not yet exhausted all available resources and, therefore, have not reached the place of optimal efficiency on the utility frontier. See HAL R. VARIAN, MICROECONOMIC ANALYSIS 269 (2d ed. 1984); see also *infra* notes 205, 206 (discussing the economic terms, "value," "evaluation," "exchange," and "value creation").

⁴⁴ See, e.g., WALTON & MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS, *supra* note 35, at 162 & Figure 5-1c (presenting a utility frontier of outcomes for the mixed bargaining context that labels one axis "Opponent" and the other "Party"; suggesting that the outcome most favorable to a given party along that frontier "might be achieved through distributive bargaining"; and pointing out that in the very process of negotiating towards that frontier each side faces a "mixed-game dilemma" because of the "broad choice between (1) attempting to discover outcomes with larger total values and (2) working toward an outcome which has a smaller total value but which does provide [one individual with] a relatively high individual payoff") (emphasis in original); see also WILLIAMS, *supra* note 41, at 15, 17-30, 41-42 (breaking down the cooperative and competitive dichotomy into sub-dichotomies: competitive effective and competitive ineffective behaviors and cooperative effective and cooperative ineffective behaviors). Cf. Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J. 905, 922-23 (suggesting that such theories of effectiveness are rooted in polarized, process-oriented descriptions of cooperativeness and competitiveness).

Figure 3**The Pareto Optimal Frontier**

Graph Illustrates Quality of Outcome for Negotiator A
in Proportion to Quality of Outcome for Negotiator B



Outcomes for A are said to improve (denoted by increasing "Units of Satisfaction" for A) in proportion to A's level of competitiveness with B, and worsen in proportion to A's level of cooperation with B.

Outcomes 1-5 are "Pareto optimal" because all resources have been utilized by the parties, denoted by the fact that any move between 1 and 5 results in a loss to A and a corresponding gain by B. Outcome 6 is not optimally efficient because "value" is left "on the table" or unused by the outcome. As between Outcomes 6 and 7, Outcome 7 is superior from the standpoint of efficiency or utility but is still inferior to the Pareto optimal outcomes (1-5) because it does not utilize the maximum value available.

Outcome 1 reflects behavior by Negotiator A that is asymmetrically competitive and produces a Pareto optimal outcome that is of maximum value to Negotiator A and of minimum value to Negotiator B.

Outcome 5 reflects behavior by Negotiator A that is asymmetrically cooperative and produces a Pareto optimal outcome that is of minimum value to Negotiator A and of maximum value to Negotiator B.

While two-dimensional graphs are useful to comparing hypothetical outcomes of the interactive dynamic between any set of behaviors, such as competition (distribution) and cooperation (integration), they do not adequately describe the *synergistic* dynamic between the negotiators as the forces of competition and cooperation play themselves out in the interactive process of the negotiation, envisioned in the interactive dynamic of the Yin and the Yang (Figure 2). This interaction represents the third dimension of negotiation—a dimension that is not measurable on a two-dimensional graph.⁴⁵ Negotiation theorists, such as Walton and McKersie in their analysis of *attitudinal structuring*, have endeavored to account for aspects of this “disorderly” dimension of the negotiation dynamic,⁴⁶ and it has also been the subject of much interdisciplinary research. Some of the most qualitative literature germane to understanding this aspect of dispute processing comes from the field of socio-legal anthropology⁴⁷ and from adherents of the related, “legal process” school of thought.⁴⁸ After the Pound Conference of 1976, a notable synergy developed across interdisciplinary lines that paved the way for the institutionalization of ADR in legal academia and a move to augment descriptive theory with prescriptive, in keeping with the aims of the “new” field of ADR pedagogy.

⁴⁵ This third dimension of negotiation is explored in *infra* Part III.

⁴⁶ The system of attitudinal structuring envisioned by Walton and McKersie touches on aspects of this third dimension. See *supra* notes 37–39, 44 and accompanying text.

⁴⁷ See, e.g., MAX GLUCKMAN, *CUSTOM AND CONFLICT IN AFRICA* (1956); PHILIP HUGH GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* (1979); KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY; CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1949); BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1984); SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978); *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* (Laura Nader & Harry F. Todd, Jr. eds., 1978); *LAW IN CULTURE AND SOCIETY* (Laura Nader ed., 1969); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993); Sanchez, *Towards a History of ADR*, *supra* note 1; David M. Trubek, *Studying Courts in Context*, 15 LAW & SOC'Y REV. 485 (1981).

⁴⁸ See generally HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 662–69 (Tent. ed. 1958); Chayes, *supra* note 6, at 1281; Lon L. Fuller, *The Forms and Limits of Adjudication*, in *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* 86–124 (Kenneth I. Winston ed., 1981).

1. *The Harvard Negotiation Roundtable: From Description to Prescription*

In the post-Pound Conference era, Harvard University became the situs for concentrated interdisciplinary collaborations germane to the theory and practice of ADR. In 1982, the Harvard Program on Negotiation, working with faculty members from Harvard Law School, Harvard Business School, and Harvard's Kennedy School of Government, as well as from the Sloan School of Management at MIT, and other universities in Boston and its suburbs, founded the "Negotiation Roundtable" as a forum for sharing ideas about negotiation and dispute resolution. Earlier versions of this forum included some of the same academics from universities around the Boston area, as well as some visiting scholars from institutions such as the University of California at Berkeley.⁴⁹

The Negotiation Roundtable, its informal predecessors and subsequent spin-offs fostered the development of interdisciplinary scholarship concerning dispute resolution. An early product of this think-tank environment at Harvard was the now classic text on "principled" negotiation (originally intended to be a guide for international mediation), *Getting to YES*, by Roger Fisher and William Ury, published in 1981.⁵⁰ A year later, Howard Raiffa, of the Harvard Business School, published his classic on the subject, *The Art and Science of Negotiation*.⁵¹ Both books moved negotiation pedagogy beyond the descriptive realm of pure theory into a prescriptive, practical realm that aimed at presenting useful advice about how negotiators "should negotiate" in the real world.⁵²

Getting to YES was decidedly less "scientific" and more "artistic" in tone and content than *The Art and Science of Negotiation* and became an international best seller, translated into numerous languages. Over twenty

⁴⁹ Beginning in 1981, at the invitation of Frank Sander, I was privileged to attend a number of these fora in the company of some of the most highly respected adherents and critics of ADR from the fields of legal academia, legal anthropology, legal sociology, decision theory and game theory, such as Frank Sander, Roger Fisher, Bill Ury, Bruce Patton, Howard Raiffa, Sally Engle Merry, Susan Silbey, Laura Nader, Donald Black, Mary Rowe, Larry Susskind, Jeff Rubin, Bob McKersie, and Martha Minow.

⁵⁰ FISHER & URY, *supra* note 41. An earlier incarnation of this work focused on the originally intended context. See ROGER FISHER, *INTERNATIONAL CONFLICT FOR BEGINNERS* (1969).

⁵¹ RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION*, *supra* note 41.

⁵² *Id.* at 5.

years after its publication, it remains both a beacon of enlightenment for new generations of students and practitioners of ADR, as well as a lightning rod for impassioned criticism from many of Fisher's and Ury's colleagues whose own core theories of negotiation (and perhaps of human nature as well) differ from theirs. One classic, critical book review by Michigan Law School professor, James White, occasioned an equally impassioned response by Fisher himself.⁵³ Suffice it to say that different outlooks about negotiation theory and practice have ironically become the stuff that academic disputes (short of blood feuds) are made of!

The core of the critical analysis of *Getting to YES* is that Fisher's and Ury's prescriptions for achieving win-win solutions through "principled negotiation" rely upon an ethic of discourse in negotiation and a methodology that is decidedly cooperative in nature and that relies upon both sides behaving cooperatively. That is, the theory of principled negotiation fails to take into account the countervailing force of "competition" that realistically should be accounted for in any practical guide to negotiation. However, Fisher and Ury would counter that the principled negotiation approach does provide negotiators with the conceptual tools they need to deal effectively with competitive counterparts. In its essence, the *Getting to YES* approach suggests that negotiated outcomes should be fair to all parties concerned because, like judicial outcomes, for negotiated outcomes to be considered legitimate and durable, they ought to be rooted in "objective criteria" and not be based solely on the ad hoc positions of either party. Agreements that are in this sense rooted in neutral criteria are more likely to be fair to both sides and more likely be acceptable to both.

More than any other prescriptive approach to negotiation, the Fisher-Ury model self-consciously exhorts practitioners to "negotiate justly"—a phrase not used by Fisher and Ury, but a principle that they would likely, wholeheartedly, endorse. Indeed, the methodology they propose for negotiators to

⁵³ See, e.g., James J. White, *Review Essay: The Pros and Cons of "Getting to YES" by Roger Fisher & William Ury*, 34 J. LEGAL EDU. 115, 115 (1984) ("GETTING TO YES is a puzzling book . . . frequently naïve, occasionally self-righteous, but often helpful."); Roger Fisher, *Comment on James White's Review of 'Getting to YES'*, 34 J. LEGAL EDUC. 120 (1984):

The editor has kindly invited me not to 'respond' to Jim White's review, but rather to clarify areas of disagreement between us But for the editor's fortunate prohibition, there would be a tendency to react to a review that describes oneself or one's book as distasteful, self-righteous, not rigorous, not scholarly, distorting, and naïve. Although I do not agree with those adjectives, I too see some inadequacies in the book. On the first day of my most recent negotiation course I tore a paperback copy in half to convince students how much work we had yet to do.

follow would, as it was originally conceived to do,⁵⁴ well serve mediators whose professional obligation it is to act as neutral third parties seeking to facilitate the negotiation of outcomes that are just to both sides in a dispute and meet the human needs at stake. The challenge facing negotiators who use the *Getting to YES* methodology is to “transform” counterparts who take a competitive tact by seeking to build with them a trusting, problem-solving approach to the negotiation. Notwithstanding harsh criticism that this approach is unrealistic and may even run contrary to a lawyer’s duty of zealous representation because, so the argument runs, in the “real world,” competition, not cooperation, is the norm, the Fisher-Ury team and its many adherents have carried this cooperative approach beyond the classroom into its harshest testing place—the U.S. workplace and the global stage. In the public and private sectors, Fisher and his teams of former students have often successfully helped large numbers of private citizens and corporations, as well as public entities, such as foreign governments, implement principled negotiation approaches to resolve complex disputes and devise reformative agreements for ongoing working relationships between the parties.⁵⁵

Unlike Fisher’s and Ury’s prescriptions for negotiation, calling upon the common sense of the “common person,” Howard Raiffa’s prescriptions have only one foot in the “real” world. The other is firmly planted in the realm of pure theory. Hence, Raiffa’s inclusion of the terms “art” and “science” in his book’s title. For Raiffa, it was exposure to real world experiences negotiating with his Soviet counterparts during the Cold War relatively late in his

⁵⁴ Recall that Fisher and Ury initially intended *GETTING TO YES* to be a guide for the mediation of international disputes, building upon Fisher’s earlier work in the field of international relations. See *supra* note 50.

⁵⁵ See, e.g., Roger Fisher, *The People’s Verdict*, *MACLEAN’S*, July 1, 1991, at 10–76 (detailed coverage of the negotiation workshops run by Fisher and his assistants to help Canadians resolve their constitutional crisis); Roger Fisher, *The Maclean’s National Forum: An Action Plan for Canada*, *MACLEAN’S*, Jan. 6, 1992, at 8–43 (coverage of the follow-up consultation workshops run by Fisher in Canada). The Harvard Negotiation Project, founded by Roger Fisher at Harvard Law School in the early 1980s, was the university-based center of operations for Fisher. Conflict Management Inc. was soon founded by Roger Fisher as a commercial dispute resolution consulting enterprise (now dissolved but still continued by various former students of Fisher in various satellite companies) along with Conflict Management Group, Inc., (the continuing, not-for-profit arm of the original Fisher operation). Both employed dozens of Fisher’s students to canvas the country and hot spots on the globe, respectively, bringing to corporations, governments, and communities, the transformative message of *GETTING TO YES*. As Fisher told a reporter for *Maclean’s Magazine* during one of his Canadian consultations, “Conflict is a growth industry. People are going to bump into one another ever more frequently, and we need more and more skills to deal with it.” *Id.* at 10.

academic career that moved his thinking about negotiation beyond the realm of pure theory. His book begins with a characteristically candid (and humble) account of his relegation of pure game theory (which focuses on “rational actor” decisionmaking in situations that are competitive and interactive)⁵⁶ and decision analysis (focusing on “rational actor” decisionmaking in situations that are non-interactive and noncompetitive and are, therefore, typified by uncertainty) in response to the challenges of real-world negotiations:⁵⁷

I was trained as a decision analyst and a game theorist. Did those disciplines help me in my negotiations? Was I properly trained for my role as negotiator . . . ? Perhaps, because of my training and profession, I thought more conceptually about the problems I was engaged in than I would have without that training, but I never really used the techniques of game theory—concepts and ideas, yes, but techniques, no—in my roles as negotiator And what was frustrating about this was that I was constantly involved in problems that could be loosely classified as competitive and interactive. The concepts of decision analysis seemed to me much more applicable than those of game theory, but not in the way I had taught it. The qualitative framework of thought was repeatedly helpful—not its detailed, esoteric, quantitative aspects. Simple, back-of-the-envelope analysis was all that seemed appropriate. I was constantly impressed with the limitations of iterative, back-and-forth, game-like thinking. I could try to be systematic, thoughtful, and analytic, but the “others” I negotiated with always seemed to have intricate, hidden agendas. Secretly I thought that if I could really know their true values, judgments, and political constraints, I would be doubly convinced that they were not acting in a coherent, rational

⁵⁶ See RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, *supra* note 41, at 2:

The theory of games focuses its attention on problems where the protagonists in a dispute are superrational, where the ‘rules of the game’ are so well understood by the ‘players’ that each can think about what the others are thinking about what he is thinking about ad infinitum Game theory . . . deals only with the way in which ultrasmart, all-knowing people *should* behave in competitive situations, and has little to say to Mr. X [the real-life business manager] as he confronts the morass of his problem.

Id. (emphasis in original); see also H. SCOTT BIERMAN & LUIS FERNANDEZ, GAME THEORY WITH ECONOMIC APPLICATIONS 68 (1993) (“Game theory is concerned with how individuals make decisions when they are aware that their actions affect each other and when each individual takes this into account.”).

⁵⁷ See generally RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, *supra* note 41, at 3; HOWARD RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY *passim* (1982).

way. They certainly weren't satisfying the prescriptive ideals of "rational economic man."⁵⁸

This model of the "rational economic man," influential as it continues to be in law and economics literature (and in the bargaining analysis of adherents to that field) portrays the intelligent human actor as one who is primarily motivated to maximize his own gains. This self-interested actor can be seen as mirroring the image of "capitalistic man," whose ruling moral law is Darwinian in nature in the sense that acting to maximize one's own gain is seen as the rational means of ensuring one's own fitness in the evolutionary struggle to survive in even a regulated capitalistic marketplace. One

⁵⁸ RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, *supra* note 41, at 1-4. Raiffa's explanation of his sojourns into the realm of game theory and decision analysis, prior to his experience as an international negotiator, sheds light on the nature and scope of those disciplines:

Receiving my doctorate in 1951, I drifted back and forth between game theory and mathematical statistics for the next six years. . . . I didn't know very much about business (a vast understatement) and I began by studying loads of case studies of real-world problems. Practically every case I looked at included an interactive, competitive decision component, but I was at a loss to know how to use my expertise as a game theorist

For the next ten years I stayed away from game theory and concentrated on a much simpler class of problems: decisions under uncertainty in noninteractive, noncompetitive situations. I worked in a field that has been dubbed "decision analysis."

Between 1968 and 1972, competitive, interactive problems gradually reclaimed my attention, and I became convinced that there should be a marriage between what I was then doing in decision analysis and what I had previously done in game theory. My main preoccupation was with real people in real situations: How could analysis be used to help one party in a competitive conflict situation without assuming excessive rationality on the part of the "others"? My efforts were still marginal.

In 1967 President Lyndon Johnson asked McGeorge Bundy, then president of the Ford Foundation, to explore with the Soviets ways in which science could promote international cooperation. Perhaps a joint scientific undertaking—keeping away from arms control and space exploration—would be appropriate Bundy asked me to be one of his advisors, and for four years I had a taste of international diplomacy and negotiations In 1972 twelve academies of sciences, including five from Eastern Europe . . . signed a charter creating the International Institute for Applied Systems Analysis (IIASA), now located outside Vienna. From 1972 to 1975 I was the first director of that scientific institute.

Id. at 1-3.

“material” problem with the rational actor model, as Raiffa discovered, is that its prescriptive ideals are often defied by rational men—and women.

The strategic interactions that so challenged Raiffa were also the focus of another classic text published in 1986, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*, by David Lax and James Sebenius. Written primarily for business school audiences (but also read in law school contexts), *The Manager as Negotiator* grew out of the co-authors’ interactions with Raiffa and others at the Negotiation Roundtable.⁵⁹ It concerns how businessmen in a capitalistic marketplace should act when confronting “players” in actual management contexts (i.e., the *mixed bargaining* contexts as described by Walton and McKersie). Theoretically, Lax and Sebenius build on two “strands of distinguished thought”: the field of “non-equilibrium game theory” and the study of management and the politics of organizations.⁶⁰ Their aim was to “develop a special logic of

⁵⁹ Lax and Sebenius acknowledge the critical role of the Negotiation Roundtable in the writing of this book. See LAX & SEBENIUS, *supra* note 41, at ix, xiii–xv. They explain that “manager as negotiator” is a shorthand reference to the key role of negotiation in dealings outside the chain of command (“indirect management”), as well as with subordinates and superiors. *Id.* at 2. The authors also note that:

Along with more “standard” gambits are actions intended to persuade; to alter the issues, parties, alternatives to agreement, and evoked interests; as well as to learn and to transform perceptions of the situation. An agreement, if one results, may range from a legal document to an implicit understanding. Such agreement may effectively and permanently bind the parties or it may be fragile and renegotiable. Public and private managers find themselves in all kinds of situations that require this process and closely related activities that are amenable to similar analysis (mediation, arbitration, changing the game, influencing decisions at some remove) We seek to develop advice for a particular person without assuming strict rationality of all participants.[.] The principles we set forth . . . apply most directly to negotiations aimed at reaching contracts or formal understandings.

Id. at 2–3.

⁶⁰ LAX & SEBENIUS, *supra* note 41, at xiv; see generally ROBERT AXELROD, THE EVOLUTION OF COOPERATION 216 at n.2 (1984) (portions of this book were published in article form in 1980 and 1981); THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 108–45 (1986) (addressing the changing roles of management and unions since World War II and the resulting changes in the structure of collective bargaining); WALTON & MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS, *supra* note 35, at 47–57 (elaborating on non-equilibrium game theory in the context of industrial relations); RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, *supra* note 41, at 21–22 (explaining that while equilibrium in game theory occurs when “[a]dvice is given symmetrically to all parties about how to play a game,” the study of real people in real conflict situations is inherently asymmetric, giving rise to non-equilibrium game theory); THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 57 (1960) (discussing importance of game moves and communications in coordinating negotiators’ behavior around “some focal point for each person’s expectation of what the other expects him to be expected to do”).

negotiation, helpful to both practitioners and students of the process . . . develop[ing] advice for a single particular person [*i.e.*, the manager] without assuming strict rationality of all participants.”⁶¹ The book’s core contribution to the field of negotiation theory and practice was its articulation of the concept of the “Negotiator’s Dilemma.”

The concept of the Negotiator’s Dilemma is a creature of the *mixed bargaining* construct envisioned by Walton and McKersie. In their book, Lax and Sebenius assert that all negotiations contain cooperative and competitive dimensions and that these elements, necessarily at odds, affect “virtually all tactical and strategic choice.”⁶² Their chief contribution to negotiation theory was the distillation of the essence of negotiation as an interactive *process* typified by “a central, inescapable tension between cooperative moves to create value jointly and competitive moves to gain individual advantage[.]”

⁶¹ See LAX & SEBENIUS, *supra* note 41, at 26 & n.36 (noting the book’s theory is therefore “asymmetrically prescriptive” and thus, it would seem, aims at real world situations where information asymmetry is the norm and few, if any, actors are “rational” in the narrowly defined economist’s conception of rationality). Other academic disciplines studying negotiation in different contexts have structured related descriptive and prescriptive theory around different “logics.” See generally ALLISON, *supra* note 4, *passim* (bureaucracies); GULLIVER, *supra* note 47, at 64–67 (anthropological analyses of negotiation and conflict resolution); THOMAS KOCHAN & HARRY C. KATZ, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS: FROM THEORY TO POLICY AND PRACTICE *passim* (1988) (labor relations and collective bargaining); R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS *passim* (1957) (game theory); RICHARD E. NEUSTADT, PRESIDENTIAL POWER 80–111 (4th ed. 1980) (special leadership positions such as the presidency); DEAN G. PRUITT, NEGOTIATION BEHAVIOR 91–136 (1981) (behavioral propositions deduced from laboratory experiments by social psychologists); RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, *supra* note 41, at 2–6 (theories taking off from game theory but without its “self-imposed” and “exceedingly restrictive assumptions”); ALVIN ROTH, AXIOMATIC MODELS OF BARGAINING 28–35 (1979) (investigations of the behaviors from game theory and mathematical economics that impose strict conceptions of rationality and circumscribed situations); JEFFREY Z. RUBIN & BERT BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 298 (1975) (reviewing the vast literature on theories of bargaining behavior and suggesting the need for “observation as well as intervention in the bargaining process as it occurs in reality”); SCHELLING, *supra* note 60, at 81–162 (looking at strategy in international conflict resolution); THOMAS C. SCHELLING, ARMS AND INFLUENCE *passim* (1966); WALTON & MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS, *supra* note 35, *passim* (negotiations in industrial relations); IRA W. ZARTMAN & MAUREEN BERMAN, THE PRACTICAL NEGOTIATOR 2–4 (1982) (international diplomacy); THE DISPUTING PROCESS, *supra* note 47, *passim* (cross-cultural analysis); *Negotiation*, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 117–20 (David L. Sills & Robert K. Merton eds., 1968).

⁶² LAX & SEBENIUS, *supra* note 41, at 30.

or "claim" value individually.⁶³ The central, practical task facing the negotiator, according to Lax and Sebenius, is how to "manage" this tension between the opposite impulses of cooperation and competition. The descriptive and prescriptive features of the Negotiator's Dilemma, therefore, venture into the territory of the third dimension of mixed bargaining—the interactive dynamic between competition and cooperation.

2. The Recurring "Dilemma" in Theory and Practice

Lax and Sebenius adapted their label, Negotiators Dilemma, from a classic, 1950s game theory experiment called the "Prisoner's Dilemma" game.⁶⁴ That game has widely influenced the course of negotiation theory, pedagogy, and even its practice, to the present day.⁶⁵ As discussed in Part III,

⁶³ *Id.* Cf. WALTON & MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS, *supra* note 35, at 162 (discussing levels of strategic choice in the "mixed game dilemma" where "there are not only several different total values available to the parties but there are also alternate sharing ratios."). *See also infra* notes 217–18 (discussing the economic terms "value" and "value creation," respectively).

⁶⁴ The game was created by Merrill Flood and Melvin Dresher, and then formalized by A. W. Tucker. *See* AXELROD, *supra* note 60, at 216 n.2; *see also* LAX & SEBENIUS, *supra* note 41, at 39–40 n.3; LUCE & RAIFFA, *supra* note 61, at 2–6 (discussing the purpose and nature of game theory); RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, *supra* note 41, at 123–26.

⁶⁵ *See, e.g.,* RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 223–42 (2002) (incorporating the negotiator's dilemma as a central analytic theme); MNOOKIN, ET AL., *supra* note 38, at 11–43 (same); *see also* Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends?*, *supra* note 23, at 1621. Whether the theory is exogenous to negotiation, or endogenous, raises profound questions for future empirical research.

For a succinct discussion of some of the methodological considerations of endogenous and exogenous reasoning, *see* Jonathan R. Cohen, *Turning the Tables: Negotiation as an Exogeneous Variable*, in NEGOTIATING ON BEHALF OF OTHERS, *supra* note 38, at 226–33; *see also infra* note 87 (discussing influence of the Oil Pricing (Prisoner's Dilemma) Game used in the Harvard Program on Negotiation Executive Training program on its participants).

For earlier examples of the influence of prisoner's dilemma-type pay-off structures on bargaining theory, *see* PRUITT, *supra* note 61, at 102–10; WALTON & MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS, *supra* note 35, at 46–57; Otomar J. Bartos, *How Predictable Are Negotiations?*, in THE 50% SOLUTION: HOW TO BARGAIN SUCCESSFULLY WITH HIJACKERS, STRIKERS, BOSSES, OIL MAGNATES, ARABS, RUSSIANS AND OTHER WORTHY OPPONENTS IN THIS MODERN WORLD 486–509 (Ira W. Zartman ed., 1976); Richard E. Walton & Robert B. McKersie, *Behavioral Dilemmas in Mixed-Motive Decision Making*, 11 BEHAV. SCI. 370, 371–84 (1966). Another predecessor is an abstract version of a similar dilemma investigated by game theorists studying bargaining with incomplete information. *See* R. Myerson, *Incentive Compatibility and the Bargaining Problem*, ECONOMETRICA (1979), 47:61–74 (finding that in "highly simplified situations

it is also germane to the heuristic framework set forth in this Article for negotiating justice and human needs. The original Prisoner's Dilemma game pitted two players against each other. The players assumed the role of "prisoners" accused of committing a crime as accomplices. They were not real-world prisoners. In the construct of the game, each player-prisoner was pitted "against" the other as part of the state's "strategy" for prosecuting them both successfully. Each was isolated from the other, held in separate cells for questioning, and both were told that they faced "certain conviction on a lesser offense and probable exoneration on a greater offense."⁶⁶ The prosecuting attorney then gave each the following choice: "turn state's evidence against your accomplice and receive a suspended sentence for the lesser offense while your accomplice is convicted of the greater offense; or remain silent and hope your accomplice does not rat on you."⁶⁷

The final factor for consideration presented to each player was that neither cared about what happened to the other. That is, each player's choice was to be informed by self-interest alone. Nevertheless, the three possible outcomes in the game's payoff structure, or reward-penalty matrix, were dictated by the interactive consequences of both prisoner's choices: (1) if one prisoner defected (competed) and one remained silent (cooperated), the defector would get the highest payoff in the form of the most lenient (suspended) sentence, while the silent prisoner would receive the lowest payoff in the form of the most severe sentence (conviction of the greater offense); (2) if both prisoners defected (mutual competition) each would receive a moderate payoff in the form of a sentence that was more severe than the most lenient but more lenient than the most severe (a slightly reduced sentence for the greater offense); (3) if both prisoners stayed silent (mutual cooperation) each would receive a better payoff than if both had defected as in scenario 2 (mutual competition), by being convicted of only the lesser offense for which they had been held.

The purpose of the state's strategic isolation of each prisoner was to create uncertainty in both about whether the other would turn state's evidence, creating an element of information "asymmetry," or imbalance, between the state and the prisoners, with the state having full, and the prisoners having incomplete, information about whether one has incriminated

that are analogous [to those discussed by Lax and Sebenius] fully honest revelation of private information by individual bargainers and Pareto efficiency cannot simultaneously be achieved").

⁶⁶ Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 443 (1992).

⁶⁷ *Id.*

the other. This information asymmetry, coupled with the game's ethic of self-interest, was designed to induce each prisoner to incriminate his accomplice, or "defect," rather than remain loyal to him by staying silent. In the logic of the game, defection was seen as "competitive" behavior and silence was seen as "cooperative" behavior. The game structure's inducement to compete, however, created a dilemma for each prisoner because the highest possible payoff could be achieved through mutual cooperation and the worst possible payoff would result from mutual defection (the result that would occur if each player behaved "rationally" by serving his self-interest within the logic of the game). The "dilemma" for each prisoner, therefore, was that while each had an "individual incentive to turn state's evidence to reduce his jail time, . . . if each follow[ed] this *individually* rational choice they [would] both do [some] time for the more serious crime," (scenario 2, above).⁶⁸ Despite this dilemma, however, the self-interested ethic of the game coupled with the strategic element of information asymmetry, dictated that acting cooperatively to avert the worst possible outcome for both would make less sense for each individually than defecting because the penalties for competition under any of the three outcomes (*i.e.*, one-sided and mutual competition—scenarios 1 and 2) were less severe than the penalty for one-sided cooperation (scenario 1). In game theory jargon, therefore, the "strategic" or "rational" (best) choice for each player in the Prisoner's Dilemma game would be to "compete" rather than to "cooperate."

Game theory experiments such as the Prisoner's Dilemma are designed to help sociologists understand how cooperation between people can develop (or be induced) and also prevail (as it has throughout human history) when individuals have incentives to behave competitively at the expense of cooperation and when there is no central authority (governmental, religious, etc.) forcing them to behave cooperatively.⁶⁹ Since the 1950s, social scientists have experimented with variations of the original Prisoner's Dilemma game in an attempt to isolate the key elements that alter the participants' choice.⁷⁰ It is still widely used as the classic model for

⁶⁸ *Id.* (emphasis added); see also AXELROD, *supra* note 60, at 3, 8 & Figure 1 (Prisoner's Dilemma payoff structure); RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION*, *supra* note 41, at 124–25 & Figure 22 (same).

⁶⁹ See AXELROD, *supra* note 60, at 3, 7.

⁷⁰ See generally LUCE & RAIFFA, *supra* note 61; ANATOL RAPOPORT, *TWO-PERSON GAME THEORY: THE ESSENTIAL IDEAS* (1966). In this respect, the "utility" of game theory is that it provides provocative illustrations of behavioral attributes of mythical people acting alone or in groups, such as in the collective bargaining context. It also serves as a basis for answering specific questions about the motivation to act, and the consequences of action in any given combination of fact patterns where information exchange is variable. When information exchange is "imperfect" or "asymmetric" (as is usually the case in the real world) either by virtue of there being no communication between the

illustrating theoretical consequences of carefully calibrated external variables in hypothetical human interactions.⁷¹ One general insight to be drawn from the Prisoner's Dilemma game that is central to the "resolution" of the dilemma itself, is that no person (or prisoner) is a circle of one; each is bound to the other in a circle of interdependence that looks very much like the images of the Yin and the Yang depicted in Figures 1 and 2.⁷² Another insight is that in this circle of two, the most optimal outcomes may be achieved through a balance of non-rational behavioral strategies that "risk" cooperation in order to avert asymmetry in the scales of justice.

In the ongoing labor relations debate about the scope of permissible collective bargaining strategies under the Wagner Act and its amendments, Prisoner's Dilemma analysis has been used to support an image of the Act that permits some margin of so-called non-rational bargaining behaviors.⁷³

parties, inadequate communication, or misleading communication between them, researchers can study the consequences of this "information asymmetry" on the parties' behavior and determine whether it leads them to make competitive or cooperative choices or ones that are "rational" or "non-rational" in light of the "logic" of the game as dictated by its pay-off structure. *See supra* note 56.

⁷¹ For example, in the area of labor relations law, the Prisoner's Dilemma and its game theory variants are of continued utility to scholars in their descriptive assessments of proposals for labor law reforms. *See* Dau-Schmidt, *supra* note 66, at 443–44 (suggesting that the costs of collective bargaining can be modeled as positional externalities using game theory); *see also infra* note 73 and accompanying text.

⁷² The related sociological insight that every individual is part of a web of group affiliations can be attributed to Georg Simmel, one of the founders of the modern discipline of sociology at the turn of the 20th-century. Among Simmel's subjects of study was the role of conflict in human relations and the interdependency of individuals with groups. *See generally* GEORG SIMMEL, *CONFLICT AND THE WEB OF GROUP AFFILIATIONS* (Kurt H. Wolff & Reinhard Bendix trans. & eds., 1955). This web of affiliation is central to the resolution of the Prisoner's Dilemma. *See infra* text accompanying notes 165–67. Within the realm of game theory, the Prisoner's Dilemma itself can also be "resolved" in a variety of ways relevant to its resolution in real-world negotiations. *See* AXELROD, *supra* note 60, at 11; *cf.* MNOOKIN ET AL., *supra* note 38, at 27 (suggesting the Negotiator's Dilemma cannot be "resolved," just "managed").

⁷³ Many prominent scholars view the Wagner Act as having created a "monopoly model" of labor-management relations, analyzing the Act's sanction of unionization and the collective bargaining process as effecting the cartelization of labor. *See generally* RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 325–68 (1982) (concerning the monopoly theory of unions); *see also* Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1402 (1983) ("The basic structure of the Wagner Act . . . precludes its effective justification on utilitarian grounds . . . because a union protected by government order will be able to appropriate economic rents from firm

This analysis suggests that while these behaviors may be marginally inefficient, they are endemic in the realistic process of negotiation in collective bargaining, and work to *enable* and *empower* the parties to achieve higher levels of self- and other-awareness needed for them to adjust their expectations to each other's, and to fulfill their respective goals to the greatest extent possible.⁷⁴ It also suggests that the bargaining process itself should not be artificially circumscribed by too many rules or its players will lose the capacity to play a full game with its admixture of competitiveness and cooperation.

In short, Prisoner's Dilemma-type games are still widely viewed as useful theoretical test tubes for experimenting with strategic variables that may produce real world lessons about competitive and cooperative behavior in negotiation. In continually changing versions of the game researchers continue to ask what is perhaps one of the most basic yet profound questions in the history of philosophy and theology: "When should a person cooperate,

specific resources and perhaps monopoly profits from industry-wide cartelization."); Posner, *supra* note 28, at 990 ("American labor law is best understood as a device for facilitating . . . the cartelization of the labor supply by unions.").

Adherents of the monopoly model suggest that the Act should be reformed or altogether scrapped because it allows for a range of "strategic bargaining behaviors" that are inconsistent with the economic model of labor relations it endeavored to create. See Epstein, *supra*, at 1382–84, 1404–07. Professor Dau-Schmidt defines "*strategic behavior* as any activity undertaken by one party to an agreement to increase its benefit from the agreement at the expense of the other party to the agreement." Dau-Schmidt, *supra* note 66, at 442 (citing Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1359 n.42 (1988)); see generally Jason S. Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 639–48 (1990).

One response to this critique of the Wagner Act uses game theory—in particular, a model of the Prisoner's Dilemma—to defend the parameters of bargaining behavior allowed under the Act, suggesting that the "strategic behaviors" complained of by the monopoly model adherents are consistent with the Act because they are "positional externalities" envisioned by the act. "Positional externalities" refer to the "costs incurred in attempting to gain the upper hand in the agreement." Dau-Schmidt, *supra* note 66, at 442 (citing ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 629–38 (1991)). Professor Dau-Schmidt suggests that such externalities are necessary to account for normative strategic behaviors under any reasonably sound economic model of the NLRA. See *id.* at 476–77. Whether those bargaining costs or "positional externalities" are acceptable as a matter of Wagner Act policy is a question of ongoing debate in labor law reform discourse. Proponents of the Act suggest that the statute takes a "broad view of allowable strategic bargaining behavior," rather than the narrower view suggested by the monopoly model theorists, because the broader view is the more realistic view in light of the real-world dynamic of negotiation. See *id.*

⁷⁴ See *id.*

and when should a person be selfish, in an ongoing interaction with another person?"⁷⁵ The extent to which game theory results provide meaningful insight about the influence of the impulse to compete and the instinct to cooperate on human relations and discourse is an open question. To be sure, there continues to be little agreement about the right answers to the question. Different world religions, for example, often take diametrically opposed views of what the "right" answer is. This is significant because theological answers to these questions are often intrinsically value-based, not outcome-determined. It may not matter if the individual adherent of a particular religion or culture does "better" in an interaction with another person by defecting if his religion or culture considers the defection itself to be a "damnable" act. Therefore, secularized "incentive structures" that seek to manipulate the "rational" choices of game participants by interjecting the assumption that neither player "cares" about what happens to the other may not account for the moral dimensions of real-world decisionmaking that can affect player choices regardless of artificial, penalty-reward consequences reflected in a game's pay-off structure. Nor may the game scores adequately measure the value of the outcomes to each player if the point system fails to take into account the values of the participants. And in the absence of "universal values," each individual may value the outcomes differently, making it difficult to create credible "uniformity" of outcome in the game theory framework. As Robert Axelrod, one of the most influential analysts of the Prisoner's Dilemma game, has opined:

The answer each of us gives to [these] question[s] has fundamental effect on how we think and act in our social, political, and economic relations with others. And the answers that others give have a great effect on how ready they will be to cooperate with us.

The most famous answer was given over three hundred years ago by Thomas Hobbes. It was pessimistic. He argued that before governments existed, the state of nature was dominated by selfish individuals who competed on such ruthless terms that life was "solitary, poor, nasty, brutish, and short." In his view, cooperation could not develop without a central authority, and consequently a strong government was necessary. Ever since, arguments about the proper scope of government have often focused on whether one could, or could not, expect cooperation to emerge in a particular domain if there were not an authority to police the situation.

⁷⁵ AXELROD, *supra* note 60, at 3 (citations omitted).

Today nations interact without central authority. Therefore the requirements for the emergence of cooperation have relevance to many of the central issues of international politics. The most important problem is the security dilemma: nations often seek their own security through means which challenge the security of others. This problem arises in such areas as escalation of local conflicts and arms races. Related problems occur in international relations in the form of competition within alliances, tariff negotiations, and communal conflict⁷⁶

The questions posed by the Prisoner's Dilemma game are particularly relevant to the present Article because, due to the institutionalization of ADR, courts now play a variable role as the "central authority" on the contemporary dispute processing continuum. Whereas Prisoner's Dilemma-type games assume the absence of a central authority that could affect or regulate the behaviors of parties (or players), the presence of a centralized legal-system authority in the administration and practice of ADR processes may impact the extent to which ADR practitioners can successfully use ADR processes to negotiate justice and human needs. In institutionalized ADR processes such as those operating under the aegis of a multi-door courthouse umbrella or in the context of judicial settlement conferences, a court-centered authority is on hand to facilitate and, at times, oversee the settlement process. In these contexts, this centralized court authority may play a constructive role in pushing the parties towards a just settlement, especially where judicial approval of settlement outcomes is mandated or where judges play a mediative role in settling lawsuits that they would have the power to decide in the absence of a settlement. In extra-court ADR processes, practitioners and parties often "bargain in the shadow of the law" or "in the clear light of legal certainty" (depending upon how much uncertainty of outcome the legal rules create), and are thereby at least minimally constrained by legal standards to which they would have recourse in the absence of acceptably just settlement outcomes.⁷⁷

The extent to which the institutionalization of ADR is increasing its use to resolve lawsuits suggests that courts and legal rules will increasingly serve as central authorities in regulating the cooperative and competitive behaviors of participants (and practitioners) in ADR processes.⁷⁸ Nevertheless, the

⁷⁶ *Id.* at 3–4 (quoting THOMAS HOBBS, *LEVIATHAN* 100 (Scolar P. Menston 1969) (1651)).

⁷⁷ Compare Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 959–77 (1979) with Sanchez, *Towards a History of ADR*, *supra* note 1, at 26–30.

⁷⁸ See, e.g., Hope Viner Samborn, *The Vanishing Trial*, *A.B.A. J.*, Oct. 2002, at 24, 24–27 (examining the declining rate of "public resolution" of lawsuits through federal and state trials as a result of increasing use of ADR processes to settle lawsuits).

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central question posed by the Prisoner's Dilemma game theory experiments continues to be relevant in assessing variables that may inspire cooperative, or induce competitive, behaviors and otherwise shape the parties' behaviors and their decisions in settlement processes. The question of how much "central authority" is needed system-wide to effect the negotiation of justice and human needs through ADR is certainly an open one. But the history of the ADR movement in the twentieth century suggests that its underlying premise favors the predominance of individual free choice over governmental paternalism.

B. Throwing off the "Shackles" of the Prisoner's Dilemma

In the 1980s Robert Axelrod developed a well-known computerized version of the Prisoner's Dilemma game, similar to the 1950s prototype. Unlike the prototype which was a one-round game that asked the players to make a one-time decision whether to defect or not, Axelrod's computerized version of the game was designed to test, over the long haul of many rounds (called an "iterated" rather than single-round game structure), whether the strategy of cooperation or competition would prevail. The simple payoff structure of Axelrod's version of the Prisoner's Dilemma was the same as the game's prototype:

[T]here are two players. Each has two choices, namely [to] cooperative or [to] defect. Each must make the choice without knowing what the other will do. No matter what the other does, defection yields a higher payoff than cooperation. The dilemma is that if both defect, both do worse than if both had cooperated.⁷⁹

Whereas the logic of the original, single-round Prisoner's Dilemma game induced competitive decisions because neither side had advanced warning of what choice the other would make, the iterated version of the game produced a different logic because it corrected for that information asymmetry. After repeated rounds of play, each player had some measure of information about the other's pattern of choice. As a result, the competitive strategy induced by the pay-off structure wore thin as the players who had acted "cooperatively" (and as a result earned fewer points) strategized to penalize the competitive players until the latter "reformed their ways" and began to make reciprocally cooperative moves. In Axelrod's version of the game, the most successful strategy proved to be one of "conditional cooperation." That is, ongoing

⁷⁹ AXELROD, *supra* note 60, at 3.

cooperation between the parties was *conditioned* upon each side's cooperative reciprocity. If one side "defected," the other side would "counter-defect" resulting in a punitive point loss to the defector. Axelrod called this the "tit-for-tat" strategy.⁸⁰ The initial cooperator would continue to make these defecting or counter-competitive moves until the initial defector signaled that he was willing to play cooperatively. Then mutual cooperation became the pattern of the players' interactions.

Lax and Sebenius draw their most salient prescriptive insights from Axelrod's version of the Prisoner's Dilemma game.⁸¹ They suggest that the Negotiator's Dilemma—the "central, inescapable tension between cooperative moves to create value jointly and competitive moves to gain individual advantage," or "claim" value individually⁸²—can best be managed if the negotiator is "conditionally open" to cooperation, with the condition being the *demonstrated* mutual cooperation of the parties. If one party makes a competitive move to claim value for himself, the other should demonstrate that he is "provocable," and engage in the "tit-for-tat" strategy described by Axelrod. Then, if the "competing" or "claiming" party reformed his ways and demonstrated cooperative behavior, the punitive, tit-for-tat strategy should be discontinued, and the provoked party should reward the claiming, competitive party by "forgiving" him and once again behaving cooperatively himself.⁸³

In Axelrod's view, the tit-for-tat strategy explains "how" and "why" cooperative behavior evolved to effect a cohesive "equilibrium" in human society. He suggests that in evolutionary biology terms, "cooperative" behaviors have been "naturally selected" to ensure the "fitness" or continuation of the human species, and that they "pay off" for individuals and the human species as a whole, more so than perpetually competitive behaviors. ADR scholars have widely viewed this insight as supporting the hopeful proposition that negotiation and other ADR processes that assist parties in "creating value" can serve to dampen the competitive tension that typifies the Negotiator's Dilemma.⁸⁴

Indeed, it would seem that once the parties in a negotiation reached this enlightened stage of mutual cooperation, they would have discovered the

⁸⁰ *Id.* at 96.

⁸¹ *Id.* at 8; see also Douglas Hofstadter, *Metamagical Themas: Computer Tournaments of the Prisoner's Dilemma Suggest How Cooperation Evolves*, SCIENTIFIC AMERICAN, May 1983, at 16–26.

⁸² *Id.*; see also *infra* notes 217–18 (discussing the economic terms "value" and "value creation").

⁸³ See LAX & SEBENIUS, *supra* note 41, at 181–82.

⁸⁴ See, e.g., Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends?*, *supra* note 23, at 1621; MNOOKIN ET AL., *supra* note 38, at 11–43.

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antidote to the Negotiator's Dilemma. Perhaps it is for this reason that Lax and Sebenius admonish that, in the real world, their prescription—the tit-for-tat strategy—may be less certain to succeed than it did in Axelrod's computerized version of the Prisoner's Dilemma, because in the real world “repetition, detection, and known, unchanging payoffs are not guaranteed; in fact, each aspect [is] often the subject of tactical action, both to elicit mutual cooperation and to elicit another's cooperation in order to exploit it.”⁸⁵ Thus, Lax and Sebenius suggest that, at best, the tit-for-tat strategy may serve the self-interested focus of the proverbial, “rational economic actor” when he tactically structures his negotiations to allow for repeated interactions with his counterpart, giving the rational actor the opportunity to detect competitive moves by the other side to “claim value” so that he can avail himself of the retributive bargaining strategy (tit-for-tat) and exact relationship payoffs, eventually reaching the equilibrium of mutual cooperation. In this way, perhaps, the tactical, rational actor, having gained insight from the descriptive and prescriptive features of the Prisoner's and Negotiator's Dilemmas, *may* be better able to negotiate justice and human needs for himself, though not necessarily in a manner that also serves the rights and needs of the other side.

The risk that the tit-for-tat strategy will actually work to escalate conflict, instead of inducing mutual cooperation to resolve it, has led to considerable disagreement in the field of negotiation theory and practice about its use in response to “value claiming” or competitive tactics. Roger Fisher, for example, vehemently rejects use of tit-for-tat as a credible strategy for achieving mutual cooperation.⁸⁶ Instead, Fisher's model for negotiating justice suggests that building good working relationships, rather than depending on the punitive tit-for-tat dynamic, is the best way to foster mutual cooperation.

In the still influential workshop on negotiation that Fisher founded at Harvard Law School in 1980 (shorter, week-long versions of which were later developed and are still regularly taught to thousands of professionals through executive training and continuing legal education programs at Harvard Law School's Program on Negotiation), Fisher began the course by teaching a negotiation simulation derived from a modified Prisoner's Dilemma game (originally called the Populator Case, and now called The Oil Pricing Exercise). He used the exercise to illustrate his belief that the strategy of cooperation was the best strategy for negotiators to follow, even in the

⁸⁵ LAX & SEBENIUS, *supra* note 41, at 182.

⁸⁶ See ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE* 197–202 (Penguin Books 1989).

face of competitive strategies. His prescriptive advice to students was that they should always begin a negotiation by sending the message that they are trustworthy and cooperative and then continue this practice as a matter of principle, even in the face of defection. Translated into the framework of the strategic choice of the Prisoner's Dilemma game, Fisher's message suggested that by opening such a "presumptively competitive game" with cooperative moves in order to send a message of trust and good faith to the other side, an ethic of mutual cooperation could be fostered more efficiently and effectively than it would be through use of the tit-for-tat strategy.⁸⁷

Defectors from Fisher's view suggest that his proposed strategy leaves negotiators vulnerable to repeated exploitation by strategically competitive counterparts. But Fisher, as if drawing on some intuition about the evolutionary equilibrium of cooperativeness over perpetually competitive behavior, remains censorious of tit-for-tat. He believes, it would seem, that justice and human needs can be negotiated through *principled cooperation*.

⁸⁷ The philosophical and practical influence that Fisher's secular message has had in some sectors of the ADR and legal profession appears to be profound and enduring. Countless lawyers across the nation have not only rated their experience at the Harvard Program on Negotiation as a turning point in their careers as lawyers, but as testimonial to its feasibility in a world of mythical rational actors, some have developed successful ADR models for resolving complex disputes that follow Fisher's prescriptive advice for building trust to achieve "win-win" outcomes. Numerous lawyer/mediators who attended the Second Annual Conference on Mediation at the University of Florida Levin College of Law on Sept. 8, 2001 were "graduates" of the professional education offerings at the Harvard Program on Negotiation and hailed the contributions that educational experience had made to the success of their performance as mediators and to their design of successful mediation processes for their clients. One lawyer/mediator from Birmingham, Alabama, who attended the Harvard Negotiation Workshops for professionals often encourages parties in mediation to begin the process of settlement by making simultaneous, "cooperative" offers to establish a tone of mutual trust and cooperation. The mediator strategy of encouraging disputants to make simultaneous offers is also used by a retired U.S. Magistrate judge now directing the ADR department at the prominent law firm of Irell and Manella in Long Beach, California, and a lawyer/mediator in Florida at the mediation firm of Upchurch, Watson, White & Max routinely designs mediation processes around what he calls "Simultaneous Offers." This "game" (he asks parties to disputes to play) mirrors the Oil Pricing Game used by Fisher except that this lawyer/mediator does not "hide the ball" for pedagogical purposes by endeavoring to "incite competition" and then showing that "cooperation" would have been better in the long run. Instead he advises his clients (prescriptively) to make *simultaneous* "good will" offers to send a reciprocal message of trust and cooperation, and to move stubborn parties off of their competitive positional bargaining stances. In this way, the "prescriptive lesson" of the Fisher-taught version of the Prisoner's Dilemma game works in real-world practice to "break" the tension of the Negotiator's Dilemma by rejecting its game-theory based assumptions about "competitive equilibrium" and setting the real world stage for cooperation.

The philosophical parallel between Fisher's and Ury's principled negotiation approach and the New Testament's prescription to "turn-the-other cheek" when smitten suggests that the principled negotiation approach is culturally informed by New Testament teachings. Similarly, it is interesting that there appears to be a philosophical parallel between the Lax and Sebenius prescription to engage in tit-for-tat and the Old Testament prescription that justice demands the taking of an eye for an eye and a tooth for a tooth. Both theological prescriptions, co-existing as they do on overlapping strands of the same theological continuum, represent different approaches to negotiating justice and human needs. The New Testament approach would seem to leave the matter of retributive justice to God, with no central authority on earth (in the Hobbesian sense) to stop the defector in his tracks. The Old Testament approach, by comparison, seems to attribute responsibility for effecting retributive justice to mankind, perhaps as a means of social ordering.

The extent to which game theory insights about the positive function of retributive reactions such as the tit-for-tat response to "defecting" behavior accurately reflect the complexity of the "survival oriented" behavior of real people in the real world is an important point of reflection. Often, people who are particularly empathetic will derive personal pain from harming the interests of others or, conversely, they may feel pain when they fail to satisfy the needs of another—even when those needs are in direct "conflict" with their own. As a result, they may make concessions of self-interest without considering the cost to themselves and without envisioning the consequences in terms of payoff structures like those built into the various Prisoner's Dilemma games. For example, the experience of many spouses engaged in divorce negotiations or mediations is often one of self-effacing sacrifice of rights and resources in keeping with the pattern of spousal concessions made by those spouses during their marriages.⁸⁸ Whether such concessions are "engendered"—that is, literally inspired by feelings of gender-based inadequacy or gender-based acculturation,⁸⁹ divorcing spouses often see

⁸⁸ See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1600–07 (1991).

⁸⁹ See generally Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 309–21 (1999) (suggesting that women and men display gender-based traits in negotiation); see also Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635, 1648 (1991) (discussing the early research relating to comparative use of assertive language by men and women); Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of*

themselves “as others see them”—that is, through the lens of their counterparts. This can cause them to devalue themselves in the ways that they have been devalued during the marriage. As a result, when they participate in ADR processes, the behavioral patterns of domination and submission (or competition and cooperation) that existed during the marriage may recur, rendering them, as the weaker parties, powerless to resist their spouses’ demands for resources, and even moving them to make concessions inconsistent with their own legal entitlements. In short, many people do not “compete” when it *is* in their best interest to do so materialistically, that is, when “defection” *would* be rational from the standpoint of serving justice and securing their individual human needs. Perhaps such a situation is representative of a real world “prisoner’s” dilemma, where one party to a dispute is the psychological, if not physical, prisoner of the other party. Under these circumstances, ADR should work to assist such parties to throw off the shackles of this real-world dilemma by fostering a sense of rational, self-interested behavior in the weaker party. Nevertheless, such self-interested behavior may take different forms, be expressed in different voices, and result in choices different than those prescribed by Prisoner’s Dilemma game theorists.

Carol Gilligan’s influential work on moral decisionmaking by boys and girls suggests that conceptions of right and wrong are informed by two ethics: a rule-centered “ethic of justice” and a relationship-centered “ethic of care.” It could also be said that Old and New Testament approaches to administering justice and serving human needs correspond, respectively, with Carol Gilligan’s views of the “ethic of justice” and the “ethic of care.” Gilligan’s study drew provocative gender correlations between the two ethics and what she called the male and female voices, respectively. The late scholar, Trina Grillo, who commented critically on the risks of divorce mediation for women, found in Gilligan’s paradigms the rational basis for her admonition that traditional models of divorce mediation may not adequately assist women in balancing the ethic of care with the ethic of justice, causing them to “negotiate away,” or otherwise waive, their legal rights and, sometimes, their human needs:

Carol Gilligan describes two different, gendered modes of thought. The female mode is characterized by an “ethic of care” which emphasizes nurturance, connection with others, and contextual thinking. The male mode is characterized by an “ethic of justice” which emphasizes individualism, the use of rules to resolve moral dilemmas, and equality. Under Gilligan’s view, the male mode leads one to strive for individualism and autonomy,

Competence in a Simulated Negotiation, 11 YALE J.L. & FEMINISM 271, 285–86 (1999) (discussing the perception of women as weaker and less effective negotiators than men).

while the female mode leads one to strive for connection with and caring for others If she is easily persuaded to be cooperative, but [the opposing party] is not, she can only lose. If it is indeed her disposition to be caring and focused on relationships, . . . the language of relationship, caring, and cooperation will be appealing to her and make her vulnerable In short, in mediation, such a woman may be encouraged to repeat exactly those behaviors that have proven hazardous to her in the past.⁹⁰

While some practitioners, academicians, and researchers in the field of ADR question the suggestion that women “are at a negotiating disadvantage” in relation to men,⁹¹ more recent literature concerning the “social role theory of gender” substantiates a correlation in our culture between social “power and achievement” values and the “value priorities of men” on one hand, and on the other, a correlation between “universalism and benevolence” values and the “value priorities of women.”⁹² It may be that the survival instincts of human beings differ depending upon variables such as gender, temperament, and different assessments of risk. It may also be that primordial instincts beyond the vision of the human eye, and perhaps even on the fringes of scientific understanding, act as drivers of cooperation or competition, or as depressors of both behaviors, leading some individuals to avoid interactive involvement with others.⁹³

⁹⁰ Grillo, *supra* note 88, at 1601–04. Social science data supports the gender-based tendencies observed by Carol Gilligan. See Liisa Myyry & Klaus Helkama, *University Students Value Priorities and Emotional Empathy*, 21 EDUC. PSYCHOL. 25, 25–40 (2001).

⁹¹ GOLDBERG ET AL., *supra* note 7, at 169 (citing Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in KENNETH KRESSEL ET AL., *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 404–05 (1989)); see generally NANCY THOENNES, JESSICA PEARSON, & JULIE BELL, *EVALUATION OF THE USE OF MANDATORY DIVORCE MEDIATION* *passim* (1991); Charles Craver, *The Impact of Gender on Clinical Negotiating Achievement*, 6 OHIO ST. J. ON DISP. RESOL. 1 *passim* (1990); Joan B. Kelly & Lynn L. Gigy, *Divorce Mediation: Characteristics of Clients and Outcomes*, in KENNETH KRESSEL ET AL., *id. passim*; Jessica Pearson, *The Equity of Mediated Divorce Agreements*, 9 MEDIATION Q. 179, *passim* (1991). But see Robert E. Emery & Joanne A. Jackson, *The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes*, MEDIATION Q., Summer 1989, at 3.

⁹² See Myyry & Helkama, *supra* note 90, at 25–40; see also *supra* note 89 (concerning studies of gender in negotiation behavior and effectiveness).

⁹³ In explaining the underlying theory of his iterated version of the Prisoner’s Dilemma game, Axelrod draws the distinction between the approaches taken in the fields of sociobiology and evolutionary biology to identifying the causes of human behavior. That explanation may shed some light on why cooperation prevails over competition under certain circumstances, defying logic and “rationality”:

Recent social science research involving a “new” version of the Prisoner’s Dilemma dynamic suggests that when an element of “care” is interjected as a variable in the game’s structure, players can be induced to behave altruistically—that is, to make cooperative rather than competitive moves even when competition would be in their self-interest. This care-induced altruism occurred when one “player” was given some information about the other that induced feelings of empathy in the player who received the information.⁹⁴ The experiment occurred at the point in an iterated version of the Prisoner’s Dilemma game when the participants knew their opponents had already defected. The subjects of the study were sixty female college students who were divided into groups of twenty with each group being assigned one of three conditions: “no communication,” “low-empathy,” and “high-empathy.” Players in the “no communication” group were told that they would never meet, see, or know the name of their opponents. In the “low-empathy” and “high-empathy” groups, players were told that they would not meet their opponents but would receive a note from their opponents involving a recent personal experience. “Low-empathy” group members were told to try and remain objective and detached while reading the note. “High-empathy” group members were asked to try to imagine how the opponent was feeling. After reading the note, “low-empathy” and “high-empathy” group members completed a questionnaire called an “impression and feeling measure.” The results of this questionnaire revealed that among the “no communication” group, very few did not defect in response to the initial defection. But among the “low-empathy” and “high-empathy” groups, almost half of the members did not defect. Thus, empathy could be read as a powerful antidote to “defection.”

The findings of this new version of the Prisoner’s Dilemma suggest that the addition of “empathy” into the Prisoner’s Dilemma model circumvents the need for use of the tit-for-tat strategy as a means of inducing mutual cooperation because having empathy for one’s counterpart would seem to create an “ethic of care,” as articulated in Carol Gilligan’s vision. It would

Sociobiology is based on the assumption that important aspects of human behavior are guided by our genetic inheritance. Perhaps so. But the present approach is strategic rather than genetic. It uses evolutionary perspective because people are often in situations where effective strategies continue to be used and ineffective strategies are dropped. Sometimes the selection process is direct: a member of Congress who does not accomplish anything in interactions with colleagues will not long remain a member of Congress.

AXELROD, *supra* note 60, at x.

⁹⁴ See C. Daniel Batson & Nadia Ahmad, *Empathy-Induced Altruism in a Prisoner’s Dilemma II: What if the Target of Empathy Has Defected?*, 31 EUR. J. SOC. PSYCHOL. 25, 25–36 (2001). See also *infra* note 119 (defining empathy and discussing the etymology and history of the word).

seem that the interjection of the ethic of care (explicitly removed from the structure of the original Prisoner's Dilemma game and Axelrod's version of it) facilitated a synergistic dynamic that moved the players beyond the retributive ethic of tit-for-tat.

III. THE HEURISTIC FRAMEWORK FOR NEGOTIATING JUSTICE AND HUMAN NEEDS

Much in the same way that the Wagner Act aimed at leveling the playing field between management and labor, legal rules may be needed to place participants in ADR processes on more equal footing, especially in negotiation and mediation processes that occur outside the purview of judges or court administrators such as those overseeing multi-door courthouse processes.⁹⁵ On the other hand, the best strategy for achieving such a general reformatory agenda may be to "empower" through education the individuals who participate in ADR processes and the practitioners who assist them. This section of the present Article addresses the latter strategy—that is, how ADR practitioners and parties may improve their ability to negotiate justice and human needs.

A. Mapping the Three-Dimensional World: Personalities, Conflict, and Order

The prevalence of "personalities" in every negotiation, whether only two people or a multitude are involved—as can occur in the collective bargaining context—makes the science of predicting behavior in any one actor or situation an uncertain one.⁹⁶ This is the case even when the issues at stake between the parties are predominantly economic or otherwise resource driven. No matter how strong the normative influences of social values or the

⁹⁵ See *infra* notes 196-97 and accompanying text.

⁹⁶ See, e.g., Epstein, *supra* note 73, at 1407-08. With regard to the presently "[i]ncreasing disenchantment with organized labor," Epstein suggests that "[m]uch of that concern is with personalities and the subject matter of particular disputes." *Id.* at 1407. He proposes that:

What is needed is a greater concern with the institutional structures in which these *personalities* operate and these disputes take place [pointing out that] [t]he "union" interest itself is no unitary whole, but instead a complex amalgam of the individual interests of the many actors who play on the expanded stage [of collective bargaining].

Id. at 1398, 1407-08; see generally CALVIN S. HALL & GARDNER LINDZEY, THEORIES OF PERSONALITY (3d ed. 1978).

more universal survival instincts are associated with the acquisition and defense of items of economic necessity or want, differences among people's personalities will often unsettle assumptions made by lawmakers or economists or negotiation analysts about how a given rule or strategy will affect human choice, let alone serve as a reliable predictor of human behavior. As Jesse S. Nirenberg, author of the 1963 classic and still best-selling book, *Getting Through to People*, explains:

The emotional reactions of an individual to a specific situation cannot be predicted. One cannot say definitely that an individual will be angry because the circumstances call for anger, or that he will be joyful, anxious or guilty because he is supposed to be. One person may become quite angry in the exact same situation that another accepts with equanimity. Similarly, where one individual reacts anxiously another may feel quite secure. Furthermore, the same individual may react differently to the same situation at different times.

The reason for this variation is that emotional reactions are caused by factors within the individual as well as by external ones. Since the internal factors vary from individual to individual, and from time to time in the same individual, emotional reactions will vary even when the external situation remains the same . . . There are no rules to guide an observer in making a prediction of how another individual whom he does not know well will react emotionally. Of course, this does not mean that emotional reactions occur at random. There is an ultimate orderliness to the occurrence of emotions; but since any rule would have to be based on both internal and external factors and since the casual observer seldom has access to the internal factors, he is generally unable to predict how an individual unknown to him will react emotionally.⁹⁷

To be sure, therefore, the element of "personality" difference between disputing parties—that is, how the internal persons react to externalities—results in behavioral unpredictability at the interactive level. This behavioral unpredictability often results in decisions that are labeled "irrational" when they fail to conform to the egoistic instincts descriptively attributed by economists to the theoretically-dubbed "rational" economic actor. In popular parlance, attribution of the "irrational" label to behavior often carries with it a pejorative connotation, reflecting, as it may, the individual's predisposition toward nonconformity with expected modes of conduct, communication or choice. When it comes to the intended effects of a law on individual or group choice, the ability accurately to predict with some certainty the consequences of a given law on human behavior may be central to the impact on society in

⁹⁷ JESSE S. NIRENBERG, *GETTING THROUGH TO PEOPLE* 48–49 (1963).

general that the legislature envisions the law having. This legislative interest goes to the core of establishing the parameters of what is considered “order” in social life and discourse at any given time and place. Bringing “order”—in the forms of resolution—out of the chaos of conflict is certainly a central goal of ADR processes. But assessing what order is, in the form of outcomes that are or should be acceptable to all parties to a dispute, is also complicated by personality variables that defy one or two-dimensional models of outcome-assessment.

Behavioral theories about how negotiators cope with conflict are increasingly recognized as conceptually important to bridging the gap between theory and practice in the field of negotiation, and in ADR practice in general. The Thomas-Kilmann Conflict Modes Instrument sets forth a behavioral model for diagnostic use in assessing an individual's profile when responding to “conflict situations.” Its two dimensions, labeled “assertiveness” and “cooperativeness,”⁹⁸ are deemed *apparently* incompatible. The assertiveness label, defined as “the extent to which the individual *attempts* to satisfy his/her own concern,” correlates to competitiveness.⁹⁹ The cooperativeness label is defined as “the extent to which the individual *attempts* to satisfy the other person’s concerns.”¹⁰⁰ Thomas and Kilmann illustrate this model using a two-dimensional graph to plot five specific “conflict-handling” behaviors bounded by the opposing dimensions of *assertiveness* and *cooperativeness*, corresponding to the mixed bargaining model labels, *competition* and *cooperation*.

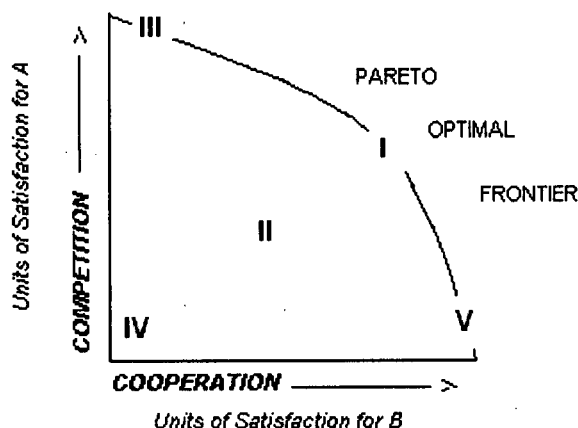
⁹⁸ KENNETH W. THOMAS & RALPH H. KILMANN, THOMAS-KILMANN CONFLICT MODE INSTRUMENT 9 (32d printing 1990) (1974); *see also* Ralph H. Kilmann & Kenneth W. Thomas, *Developing a Forced-Choice Measure of Conflict-Handling Behavior: The “Mode” Instrument*, 37 EDUC. & PSYCHOL. MEASUREMENT 309–25 (1977).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Figure 4**Tendencies for Coping with Conflict as Plotted Inside and Along the "Pareto Optimal" Frontier**

Graph Illustrates the Quality of Outcome for Negotiator A in Relation to Negotiator B Based on Negotiator A's Prevailing Tendency for Coping with Conflict



Legend for Outcomes in Relation to A's Tendencies for Coping with Conflict:

- I. Collaborating (Concern with Problem-Solving)
- II. Compromising (Concern with Fairness)
- III. Competing (Concern with Winning)
- IV. Avoiding (Concern with Avoiding Conflict)
- V. Accommodating (Concern with Good Relationships)

Thomas and Kilmann label the behaviors associated with their assertiveness/cooperativeness paradigm, *competing*, *accommodating*, *avoiding*, *collaborating*, and *compromising*, and each label carries with it a description of the salient features of the labeled behavior.¹⁰¹ Figure 4

¹⁰¹ *Id.* at 10. "Competing" is defined as "assertive and uncooperative" behavior, by which "an individual pursues [her] own concerns *at the other person's expense*." *Id.* (emphasis added). It is "a power-oriented mode, in which one uses whatever power seems appropriate to one's own position, one's ability to argue, one's rank, economic sanctions." *Id.* It could mean, for example, "standing up for your rights," defending a position which you believe is correct, or simply trying to win." *Id.* "Accommodating" is considered the opposite of competing. It is described as an unassertive but cooperative behavior:

illustrates the correlation of these various behaviors to the *competitive/cooperative* mixed bargaining paradigm. The parenthetical descriptions following the Thomas-Kilmann labels were developed by Robert Mnookin and his colleagues at Stanford Law School and Harvard Law School over the course of several years in teaching law school courses on negotiation theory and practice. Mnookin and colleagues have used an adaptation of the Thomas-Kilmann Modes Instrument in this context to help students understand their own "tendencies when faced with conflict," as well as some aspects of the interactive dynamic that can occur between negotiators based on their respective tendencies for coping with conflict. They have modified the Thomas-Kilmann labels and the descriptive features associated with them to serve these pedagogical purposes: *competing* was labeled a "concern with winning;" *accommodating*, a "concern with good relationships;" *avoiding*, a "concern with avoiding conflict;" *collaborating*, a "concern with problem solving;" and *compromising*, a "concern with fairness

When accommodating, an individual neglects [her] own concerns to satisfy the concerns of the other person; there is an element of self-sacrifice in this mode. Accommodating might take the form of selfless generosity or charity, obeying another person's order when one would prefer not to, or yielding to another's point of view.

Id. at 9. "Avoiding" is behavior that is both *unassertive* and *uncooperative*. The avoider "does not immediately pursue [her] own concerns or those of the other person. [She does] not address the conflict. Avoiding might take the form of diplomatically sidestepping an issue, postponing an issue until a better time, or simply withdrawing from a threatening situation." *Id.* "Collaborating" is "both assertive and cooperative—the opposite of avoiding." It involves

an attempt to work with the other person to find some solution which fully satisfies the concerns of both persons. It means digging into an issue to identify concerns of the two individuals and to find an alternative which meets both sets of concerns. Collaborating between two persons might take the form of exploring a disagreement to learn from each other's insights, concluding to resolve some condition which would otherwise have them competing for resources, or confronting and trying to find a creative solution to an interpersonal problem.

Id. Finally, "Compromising" is defined as

intermediate in both assertiveness and cooperativeness. The objective is to find some expedient, mutually acceptable solution which partially satisfies both parties. It falls on a middle ground between competing and accommodating. Compromising gives up more than competing but less than accommodating. Likewise, it addresses an issue more directly than avoiding, but doesn't explore it in as much depth as collaborating. Compromising might mean splitting the difference, exchanging concessions, or seeking a quick-middle-ground position.

Id.

of outcome.”¹⁰² Mnookin prefaces the exercise by stating that the labels are, at best, incomplete and may serve only as “illuminating distortions” of an individual’s tendencies for coping with conflict. And, like Thomas and Kilmann, Mnookin informs his audiences that every individual may manifest each of these tendencies in one context or another, but that one tendency may be more dominant than the others in a majority of contexts.¹⁰³ In keeping

¹⁰² Mnookin, working initially with colleagues at Stanford Law School and later with colleagues at Harvard Law School, continually revised the descriptive features of the labels assigned to conflict tendencies. During Mnookin’s year as a visiting member of the Harvard Law School faculty (1990–91), I, along with Frank Sander, Bruce Patton, and others, worked with Mnookin to come up with the modified labels and the following numerical categorization of the tendencies as well as descriptions of them for use in the exercise’s debut in the Winter 1991 Harvard Negotiation Workshop. The “Category I” tendency was the “concern with problem solving.” It was defined as a “problem focused” tendency described as follows: “when faced with conflict, [the individual] likes being creative and inventing new options, enjoys working with [the] opposing side in [a] collaborative way and ‘reasoning together.’” The “Category II” tendency was the “concern with fairness of outcome.” It was described as manifested by a willingness to compromise: the “tendency is to focus on the fairness of the resolution to *both* sides:” persons with these tendencies “enjoy[] sharing, do[] not want to appear to be selfish or self-interested; find[] it uncomfortable to be too partisan or one-sided.” The “Category III” tendency was the “concern with winning.” It was described as the “tendency to take charge”: Persons with this tendency “enjoy[] being in control; purposeful; like[] to win; feel[] responsible for outcome; [are] willing to lead; [can be] forcing; may be impatient and eager; competitive; enjoy[] being partisan.” The “Category IV” tendency was the “concern with avoiding conflict.” It was characterized by dislike of disputes. A person with this tendency “feels conflict is usually unproductive; [is] uncomfortable with explicit disagreement, especially if heated. When faced with conflict, [this person] has a tendency to withdraw or deflect. In disputes, [she] is unlikely to take the initiative; may appear to be detached, or disinterested [and is reluctant] to become involved or engaged.” Finally, the “Category V” tendency was the “concern with good relationships.” Persons with this tendency are “[s]ensitive to the feelings of others; tend[] to be supportive and helpful; receptive and accommodating; want[] to be liked; in the face of conflict desire to preserve and foster good relationships with [the] other side; in disputes, may behave in a ‘smoothing’ way; [and are] very concerned that conflict or differences may disrupt relationships.” See *Tendencies When Faced with Conflict*, (Feb. 20, 1991) (unpublished teaching tool used in negotiation workshops at Harvard Law School and Stanford Law School) (on file with the author). The category numbers assigned to each tendency were then plotted, as per Thomas and Kilmann’s approach, on a two-dimensional graph. See *supra* Figure 4.

¹⁰³ See generally THOMAS & KILMANN, *supra* note 98 (MODE Instrument Instructions); Kilmann & Thomas, *supra* note 98, at 315 (“[I]t cannot be said that the MODE instrument ‘guards’ against personality tendencies to distort self-descriptions any better than the other instruments.”). Since 1991, I have experienced numerous administrations of the MODE Instrument by Professor Mnookin. Prior to each administration of the Instrument, Professor Mnookin consistently admonished

with Fisher's and Ury's prescriptions for "win-win" negotiation, Mnookin descriptively posits that the integrative, problem-solving mode (or approach) to negotiation is likely to reap "Pareto Optimal" outcomes.¹⁰⁴ When plotted on the two-dimensional graph, the problem-solving or "win-win" approach is seen to exist at the center point along the Pareto Optimal Frontier (Figure 4, Point I).¹⁰⁵

From a pedagogical standpoint, the "win-win" point along the Pareto Frontier is therefore seen, both descriptively and prescriptively, as being the most desirable of the five approaches plotted on the graph—hence, its numerical categorization "Tendency I." However, abstract, impersonal models like the graph of the Pareto Frontier perpetrate seminal fictions in negotiation theory and practice. This is because both descriptively and prescriptively they fail to account for how differences in personalities require adjustments of strategy, necessitating the negotiator to alter her approaches if she is to achieve a win-win outcome along the "Pareto Optimal Frontier." For example, the outcome associated with "Tendency I" in Figure 4, represented as the theoretical result of a problem-solving approach by Negotiator A, may not be attainable if Negotiator B's prevailing tendency is a "Concern with Winning." Under these circumstances, Negotiator A's task may be to "transform" Negotiator B into a "problem-solving" negotiator, or herself demonstrate a "Concern with Winning" that matches Negotiator B's approach as a means of "ratcheting" the outcome to the midway point along the Pareto Frontier. One- or two-dimensional representations of negotiation behavior such as Figure 4 do not account for these and other types of interactive differences that may result from variations in each party's personality or disparate "tendencies for coping" with conflict, requiring an approach other than "problem-solving" to reach that mythical point along the Pareto Optimal Frontier that represents a "win-win" outcome. Furthermore, the graph cannot account for or display the synergistic, interactive dynamic that, as previously discussed, typifies the negotiation process. Finally, occurring as it does on a mythical, theoretical frontier, the point of "Pareto

participants that the Instrument, at best, would provide an illuminating distortion of individual tendencies for coping with conflict.

¹⁰⁴ See *id.*

¹⁰⁵ Recall that when an outcome can be plotted at this central point along the Pareto Optimal Frontier, this suggests that negotiators have effectively made full use of all of the "value" or resources available to them and have divided or distributed that value between them equally (see *supra* Figure 3, Outcome 3). A more simplified version of Figure 4 is printed in MNOOKIN ET AL., *supra* note 38, at 55 (On Mnookin's graph, the label denoting the "Problem Solving" approach is substituted with the label, "The Effective Negotiator.").

Optimality" may not exist in reality, and even if it does, it may neither be discernable to the human eye, nor measurable by the human mind, without excluding from calculation an array of personality-based "value considerations" that often defy description, let alone classification and calculation.

This failure to provide a framework for envisioning and coping with the interactive complexities of personality dynamics is also a central deficiency of the first of five prescriptive elements in Fisher's and Ury's, *Getting to YES*; that first prescriptive tenet is, "separate the people from the problem." As I have previously asked, "How can this be a central tenet of a guide to negotiation when differences between people are so often inextricable parts of the problem in negotiation?"¹⁰⁶ Dealing with personalities as they intertwine with conflict is a task particularly central to the ability of any practitioner of ADR to bring order out of chaos, and to process conflict to its point of resolution.

B. Viewing Conflict as a Force of Creative Destruction

As negotiators and practitioners of ADR, our formative experience with conflict can shape our comfort levels in processing its resolution. Depending upon the circumstances of our formative experiences with conflict, we may have seen conflict as either a constructive or a destructive force.¹⁰⁷ A predominant American cultural bias is to see conflict in pathological terms, as a source of social and personal ill health. This "negative" view of conflict underlies the instinct of many practitioners of ADR to seek to harmonize disputants, often only superficially, in order to dampen deeper conflicts between them that may be difficult to process so that at least some semblance of superficial order can be achieved. It is a cultural bias that ADR critics like Laura Nader inveigh against, suggesting the American ADR culture is, in reality, a Hobbesian form of centralized governmental control of the individual, disguised as a movement for individual self-determination. In other words, ADR is a wolf in sheep's clothing, ready to eat up the unwary disputant by suppressing the symptoms of conflict through settlements that

¹⁰⁶ Sanchez, *Empathy and Assertiveness as Negotiation Skills For Solving Problems of Difference Between People*, at 1 (unpublished paper presented to the Harvard Law School Negotiation Workshop Faculty Working Group, Spring 1994, and subsequently distributed as supplemental reading in the Winter and Spring 1995 & 1996 Negotiation Workshops, Harvard Law School) (on file with the author). See *supra* note * and *infra* note 146.

¹⁰⁷ Cf. WILLIAMS, *supra* note 41, at 18 (Williams uses four classifications to describe negotiation behavior: competitive effective and ineffective, and cooperative effective and ineffective.).

avert litigation without liberating the individual from the underlying cause of the conflict by resolving it in a manner that serves justice and human needs.¹⁰⁸

Contrary to many theorists and practitioners of ADR who view the "resolution" of conflict as the primary and positive role of ADR, Nader, like the German founders of the discipline of sociology observed at the turn of the twentieth century,¹⁰⁹ views conflict as a "natural" force of evolution that should be processed in a manner that serves individual and social progress. This functional view of conflict sees it as having internal laws of its own that must work to their ends in a constant cycle of "creative destruction."¹¹⁰ Thus, the suppression of conflict would be pathological for individuals and for society as a whole, producing escalating discontent by depriving individuals of important opportunities to release reformatory energies that are at once creative *and* destructive, as in the interactive dynamic between the Yin and the Yang.

A beginning place in this synergistic processing of conflict through ADR is the recognition that "conflict and the interpersonal tension it produces can be present in, or hover over, every stage of a dispute-related or transactional negotiation—whether it be the introductory stage, the information exchange stage, the value creating and value claiming stages, or the closure stage."¹¹¹ While conflict can have both negative and positive effects on the behavior of negotiators, on the process of the negotiation, and on its outcome, the effect that it does have in any given context depends upon an array of variables.

¹⁰⁸ See Nader, *Controlling Processes in the Practice of Law*, *supra* note 47, at 9–10; see also Richard L. Abel, *Introduction*, in 1 *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 6 (Richard L. Abel ed., 1982). Compare Carol J. King, *Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader*, 10 OHIO ST. J. ON DISP. RESOL. 65 (1994), with Laura Nader, *A Reply to Professor King*, 10 OHIO ST. J. ON DISP. RESOL. 99 (1994).

¹⁰⁹ See, e.g., SIMMEL, *supra* note 72, at 14–20; see generally LEWIS A. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* (1956) (adopting Simmel's view of conflict).

¹¹⁰ This term was used by Joseph Schumpeter, the twentieth century Austrian economist who spent his last professional years at Harvard University, to describe the effect of market forces in entrepreneurial capitalism. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 83 (3d ed. 1950); JOSEPH A. SCHUMPETER, *CAN CAPITALISM SURVIVE?* 24 (1978).

¹¹¹ Valerie A. Sanchez, *Dealing with Difference in Negotiation: The Importance of Being Assertive, Empathetic, and Earnest*, at 1 (unpublished paper presented to the Harvard Law School Negotiation Workshop Faculty Working Group, Spring 1994, and subsequently distributed, in modified form, as supplemental reading in the Winter and Spring 1995 & 1996 Negotiation Workshops, Harvard Law School) (on file with the author). See *supra* note * and *infra* note 146.

One important variable is the negotiator's individual tendencies for coping with conflict. The negotiator's capacity to cope constructively with conflict is central to her ability to work through it creatively. It is essential that every negotiator understand her own tendencies for coping with conflict, how she perceives others coping with it, and what interactive dynamics are likely associated with each side's differing conflict-management tendencies.

How does one reach this heightened level of self-awareness and awareness of others? The answers may lie in the questions to be asked of oneself and of others. In her seminal, multi-volume work of philosophy, *The Life of the Mind*, published posthumously, Hannah Arendt explored the possibility that the mind could affect reality.¹¹² Arendt was critical of what she called the "professional thinkers" of the world who "are committed to theory and inclined to *interpret* the world rather than *change* it [because] . . . [o]ften their sedentary role leads them to be more pleased with necessity than with freedom, their peace of mind achieved with acquiescence in the arrangements of the world."¹¹³ In preparation for the third volume of this *magnum opus*, on "Judgment," where her concern was with appraisals of the human condition, Arendt left behind only notes, jotted down mainly in the form of questions, not answers. She likely did so in the hope (or the belief) that "like Socrates, who had no answers, her very questions might lead to them."¹¹⁴ In the hope (and belief) that asking questions *is* the starting place for achieving greater self- and other-awareness and thereby affecting reality through cognitive processes, the following section of this Article presents an array of questions designed to help participants in ADR processes probe for answers to the difficulties that arise in the interpersonal dynamic—the dynamic that is at the mysterious core of the synergistic, party-controlled ADR processes, such as negotiation and mediation.

1. *Diagnosing Tendencies for Coping with Conflict: The Importance of Self- and Other- Awareness*

How can we diagnose our individual tendencies for coping with conflict?¹¹⁵ We should begin by focusing on childhood experiences with

¹¹² See HANNAH ARENDT, 1 *THE LIFE OF THE MIND: THINKING AND WILLING* 45–53 (1978).

¹¹³ Laurence Donovan, Book Review, *Hannah Arendt: Getting Inside the Mind*, MIAMI HERALD, Apr. 30, 1978, at 7-E (emphasis added).

¹¹⁴ *Id.*

¹¹⁵ For many people, the Thomas-Kilmann Conflict Modes Instrument can be a useful starting place. See THOMAS & KILMANN, *supra* note 98, *passim*; see also Kenneth Thomas, *Conflict and Conflict Management*, in *HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY*, 889, 900–02 (Marvin D. Dunnette ed., 1976). A similar

conflict that may have shaped our current willingness to confront it and also our ability to cope with it constructively as adults.

In our childhood interactions with others—*i.e.*, siblings, peers, and adult authority figures—can we recall the extent to which we engaged in physical and/or verbal clashes to protect ourselves or satisfy a desire or need?¹¹⁶ Can we recall if we were willing to fight to prevent others from taking something away from us, or were willing to instigate conflict to get something we wanted? Did we ever come to rely upon a central authority figure to resolve these conflicts for us before they escalated into physical or verbal altercations? Or did we learn to back off from conflict by compromising our needs or desires (including our sense of self-esteem, self-respect, or desire for fair play) without involving authority figures? Finally, did we ever find ourselves in the middle of other peoples' conflicts? In such situations, did we intervene to help them resolve the conflict, as many children often try to do in the context of parental or intra-familial conflict? Did we ever take such "peace-making" steps as parties to a conflict?

In seeking to identify one's behavioral patterns for managing conflict as adults, it is often illuminating to consider whether any childhood patterns discernably recur in our adulthood experiences with conflict. It is also particularly important to consider how our behaviors may differ in relation to different conflict-related situations (*i.e.*, work-related versus intra-familial versus arms-length contexts). In diagnosing the causes of context-specific differences in our approaches, it is usually important to consider the role of the relationships we have with the people involved in those different contexts. Are we more vigilant about seeking the just fulfillment of our human needs in the workplace setting, at home, or in the commercial world? When we act on behalf of others, which approach to the fulfillment of justice and human needs will we likely prefer?

Because some tendencies for coping with conflict serve functional purposes in some contexts and may have dysfunctional effects in others, every negotiator should evaluate the effectiveness of her context-specific behavioral tendencies. This will involve looking into the proverbial mirror to assess what we look like when behaving conflictually or coping with

self-knowledge tool is the Myers-Briggs Type Indicator. See generally Don Peters, *Forever Jung: Psychological Type Theory, The Myers-Briggs Type Indicator and Learning Negotiation*, 42 DRAKE L. REV. 1 (1993) (applying Myers-Briggs to negotiation theory).

¹¹⁶ For an interesting discussion of variations of childhood bullying, see William F. Arsenio & Elizabeth A. Lemerise, *Varieties of Childhood Bullying: Values, Emotion Processes, and Social Competence*, SOC. DEV., vol. 10 (1), 2001, at 59–71.

another's conflictual behaviors in a given context, and also whether others may see us differently. As we engage in this challenging process of self-definition and re-definition, we should freely experiment with new approaches to conflict resolution and seek to "affect reality" more consciously, through enactment of a broader array of conflict-handling behaviors.¹¹⁷ Often a threshold consideration in assessing the effectiveness of our *context-specific* tendencies is determining how various types of conflict situations make us feel. As adults, do we relish entering the fray in some contexts but not others (or in none at all)? If so, why? And just what amounts to "entering the fray?" Many people feel the tension associated with conflict in situations that may not ordinarily be considered conflict-related. Some examples of such situations are the following: disagreeing with others or being disagreed with;¹¹⁸ asking or being asked sensitive or probing questions; stating one's own opinion with conviction or experiencing another person doing so; standing up for one's interests in the face of opposition or opposing the interests of others in the face of their resistance. Knowing what types of interactions cause an increase in our pulse rates is often a clue to identifying the situations that cause us to feel the tension associated with conflict. This knowledge may help us to overcome, or at least manage, that tension more effectively and also to understand how others may feel when confronted with conflict. This element of self- and other- awareness may further improve our handling of the interpersonal dynamic of conflict resolution.

2. The Central Role of Empathy in Conflict Resolution

Every action we take as practitioners of ADR has interactive consequences for the other party, and vice versa, because the "mutual relationship" between parties to a negotiation, as the Prisoner's Dilemma game demonstrates, is intertwined and interdependent, as envisioned in the ancient and dynamic images of the Yin and the Yang (recall Figures 1 and 2). Therefore, getting to know and understand the other party is essential to the negotiation process, whether or not that process is facilitated by a mediator. In the field of behavioral psychology, the concept of "otherness" is a "multifaceted *empathy* that incorporates three dimensions: emotional, cognitive, and behavioral."¹¹⁹ *Emotional empathy* amounts to *feeling* what

¹¹⁷ See *infra* notes 133–36 and accompanying text.

¹¹⁸ Vincent P. Crawford, *A Theory of Disagreement in Bargaining*, 50 *ECONOMETRICA* 607, 607–37 (1982).

¹¹⁹ *Conflict and Otherness: Empathizing with the 'Enemy' in Cyprus*, DISSERTATION ABSTRACTS INTERNATIONAL: SECTION B: THE SCIENCES & ENGINEERING, vol. 61 (8-B), Mar. 2001, at 4386 (emphasis added). One composite definition of the multi-dimensional

others feel;¹²⁰ *cognitive empathy* amounts to *understanding* what others feel by virtue of first having an open-mind to attain that understanding;¹²¹ and

concept of empathy is “apprehending another’s inner world and joining the other in his or her feelings.” Ervin Staub, *Commentary on Part I*, in *EMPATHY AND ITS DEVELOPMENT* 104 (Nancy Eisenberg & Janet Strayer eds., 1987). The meaning of empathy comes from the Greek word, *empathia*, and the German, *Einfühlung*. See *OXFORD DICTIONARY OF ENGLISH ETYMOLOGY* 319 (C.T. Onions ed. 1966) (defining empathy from the Greek *empathia*, and the German, *Einfühlung*, as the “power of understanding things outside ourselves”). It is “most similar” in meaning to the English words “agreement, understanding, harmony, and sympathy.” *AMERICAN HERITAGE DICTIONARY*, *supra* note 33. In the English lexicon, the word, “empathy,” has a relatively short history, dating to 1909. See Lauren Wispé, *History of the Concept of Empathy*, in *EMPATHY AND ITS DEVELOPMENT*, *id.* at 18, 34, citing E. TITCHENER, *EXPERIMENTAL PSYCHOLOGY OF THE THOUGHT PROCESSES* (1909) (coining the term “empathy” from the German, *Einfühlung*, which translates literally to mean “in feeling”). It is not listed in the main text of the *OXFORD ENGLISH DICTIONARY*, only appearing in its Supplement, first published in 1933, where an illuminating example of its usage was quoted from a compelling book written five years earlier by the English literary writer, Rebecca West. See *OXFORD ENGLISH DICTIONARY, SUPPLEMENT* 329 s.v. (1933) (1961), quoting REBECCA WEST, *STRANGE NECESSITY* 102 (1928) (“The active power of empathy which makes the creative artist, or the passive power of empathy which makes the appreciator of art.”).

¹²⁰ See *Conflict and Otherness*, *supra* note 119, at 4386. Emotional empathy is often called “affective” empathy. See Harold Goldstein & Ann Higgins-D’Alessandro, *Empathy and Attachment in Relation to Violent vs. Non-Violent Offensive History Among Jail Inmates*, *J. OFFENDER REHABILITATION*, vol. 32:4 (2001) at 31, 33 (“The well known distinction between the cognitive and affective components [of empathy] respectively contrast an intellectual, role-taking process . . . with a more primitive, essentially emotional experience[.]”); Martin L. Hoffman, *The Contribution of Empathy to Justice and Moral Judgment*, in *EMPATHY AND ITS DEVELOPMENT*, *supra* note 119, at 48–53 (discussing the complexities of affective empathy); Deborah W. Kilgore, *A Group Learning Intervention into How Women Learn Empathy in Prison*, *ADULT EDUC. Q.* 51:2 (Feb. 2001), at 146, 152 (“Affective empathy . . . is a vicarious emotional response to another’s feelings that does not necessarily involve significant amounts of cognitive processing.”); Staub, *supra* note 119, at 106 (describing affective empathy as generating vicarious emotional responses in the empathizing person for the object of empathy).

¹²¹ See Goldstein & Higgins-D’Alessandro, *supra* note 120, at 32–33 (“The cognitive, role-taking approach involves apprehending the perspective of another so that one attempts to imagine what another is thinking or feeling It involves putting oneself in another’s shoes without necessarily experiencing their emotions.”); Kilgore, *supra* note 120, at 152 (“Cognitive empathy . . . is the ability to know what another person is feeling without necessarily joining them in that feeling.”); Staub, *supra* note 119, at 104–05 (defining cognitive empathy as “an awareness, an understanding, a knowledge of another’s state or condition or consciousness, or how another might be affected by something that is happening to him or her[,] [often also referred to as] role taking, or as perspective taking . . .”).

behavioral empathy amounts to *displaying emotional empathy* to the other person with some measure of *cognitive empathy*.¹²²

A completely "other-aware" person will be able to achieve the three dimensions of empathy in relation to another person. Numerous experiments in medical contexts suggest that the presence of emotional, cognitive, and behavioral empathy in doctors for their patients is crucial to patients' speedy recovery and healing, both emotionally and physically. Studies repeatedly prove that when doctors communicate with patients in a way that conveys understanding of the patient's feelings, patients are "enabled" to recover, and recover more readily.¹²³ In her classic study on empathy and healing, Saint Edith Stein described this process as "grasp[ing] the Other as a living body and not merely as a physical body."¹²⁴ Empathy thus enables physicians to "grasp the content of first-person reports of bodily disorder, and to comprehend the meaning of illness as lived."¹²⁵ Appropriately, there is now a renewed call to incorporate empathy training into medical school curricula.

The spectrum of feelings in an "other" with which one can empathize is broad. A few examples are empathic pain, anger, fear, distrust, or feelings of

¹²² Behavioral empathy is also called "joining empathy." See Goldstein & Higgins-D'Alessandro, *supra* note 120, at 33 ("The cognitive and affective components of empathy are interdependent and consideration of both is necessary to fully understand the concept."); Kilgore, *supra* note 120, at 152 ("Empathic joining is the 'sharing of emotion[]' and the kind of empathy . . . where we perceive and then join another in his or her feelings. This kind of empathy involves both cognition and affect in fairly high doses."); Straub, *supra* note 119, at 106-07 ("Empathic joining . . . is a *sharing of emotion* . . . by entering another's experience . . . by the *other's experience generating the same experience in oneself* . . . a precondition [of which] is cognitive empathy, an understanding of the cues that others provide.") (emphasis in original); see generally LEV S. VYGOTSKIĬ, *MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES passim* (Michael Cole et al., eds. 1978).

¹²³ See, e.g., Roger E. Meyer, *Forward*, in MICHAEL J. BENNET, *THE EMPATHIC HEALER: AN ENDANGERED SPECIES?* (2001) (study conducted at Harvard Medical School, Belmont, MA); 6 *BETWEEN OURSELVES: SECOND-PERSON ISSUES IN THE STUDY OF CONSCIOUSNESS* 314 (Evan Thompson ed., 2001); M. Hojat et al., *The Jefferson Scale of Physician Empathy: Development and Preliminary Psychometric Data*, *EDUCATION & PSYCHOLOGICAL MEASUREMENT*, vol. 61:2, Apr. 2001, at 349-65; *Empathy is Important for Enablement*, *BRITISH MED. J.*, Special Issue, vol. 322 (7290), April 2001, at 865 (study conducted in Glasgow, Scotland). Compare Linda Glass Johnston, *The Tobacco Dispute: A Study in the Use of Discourse and Narrative Theory in the Understanding of Health-Related Conflicts*, *DISSERTATION ABSTRACTS INTERNATIONAL, SECTION A: HUMANITIES & SOCIAL SCIENCES*, vol. 61 (8-A), Feb. 2001, at 3382, with *infra* text accompanying note 184.

¹²⁴ SAINT EDITH STEIN, *ON THE PROBLEM OF EMPATHY* (Waltraut Stein trans. 3d ed., rev. 1989), quoted in *BETWEEN OURSELVES*, *supra* note 123, at 314.

¹²⁵ *Id.*

injustice and guilt, as well as feelings of joy.¹²⁶ For years, the cutting-edge question to be tested in the field of clinical psychology was whether empathy could be taught. The implications of the answer for the criminal justice system were thought to be profound. If criminal offenders, for example, or juvenile delinquents could be taught empathy, might they be less prone to engage in behaviors that harm others? It is not surprising then, that some psychologists focused their attention on the prison as the clinical setting, and on inmates as their subjects.

In one recent prison experiment involving twenty-four female inmates in a Texas penitentiary, researchers concluded that the ability of individuals to “learn” empathy or “otherness” is shaped, at least in the short run, by their personal histories with “others” and also their levels of *self*-awareness. In this experiment, the women participated in a small group learning program called, “Explorations: Discovering the Women Within.”¹²⁷ After an initial series of “life history” interviews, the research team “was struck by the absence of an expressed sense of self as learner” in the women. One of the researchers’ central conclusions was that when it comes to adult self-awareness and awareness of other,

[t]he earliest experiences tend to carry more weight because they have been part of the [individual’s] habitus for the longest time. For this reason, the habitus tends to be conservative, to fall back on historically cumulated categories of perception. This tends ‘to guarantee the “correctness” of practices and their constancy over time more reliably than all formal rules and explicit norms.’¹²⁸

Hence, the framework of the women’s behavioral repertoires was largely set in place early in their lives. However, as the learning program progressed over time, researchers found that through collective sharing of past and daily experiences in the small group contexts, “[e]mpathy emerged as a crucial aspect of prison life in how it affected the group learning process.”¹²⁹ But the kind of empathy that developed in this prison context was “not equal to the

¹²⁶ See CONSTRUCTIVE AND DESTRUCTIVE BEHAVIOR: IMPLICATIONS FOR FAMILY, SCHOOL, & SOCIETY 61–86 (Arthur Bohart & Deborah J. Stipek eds., 2001).

¹²⁷ Kilgore, *supra* note 120, at 150; *see also* Goldstein & Higgins-D’Alessandro, *supra* note 120, at 31–53 (study of male and female violent and non-violent offenders in the New York City jail system investigating the relationship between the inmates’ empathic abilities and their respective histories of interpersonal attachment).

¹²⁸ See, e.g., Kilgore, *supra* note 120, at 148–49 (quoting PIERRE BOURDIEU, THE LOGIC OF PRACTICE 54 (Richard Nice trans., 1990)).

¹²⁹ See *id.* at 152.

range of empathic practices that are commonly employed in the 'free world.'"¹³⁰

In the prison context, unlike the free world, there is an ever present, centralized governmental authority like that envisioned in Hobbes' *Leviathan*.¹³¹ Hobbes' prescription for counteracting the state of anarchy that he believed would envelope a world where humankind's instinct for unbridled self-interest went unregulated by a centralized and coercive governmental force was to impose upon that world such a centralized, coercive authority embodied in the personage of an absolutist monarch—"Leviathan." Hobbes' prescription for ruling "the unruly masses" inspired Jeremy Bentham's vision of prison reform during the Victorian era of English history. Bentham's novel prison design, known as the "panopticon" (a circular prison with all cells visible from a central tower), had a Leviathan-like effect on prisoners' behavior; it set up fear in them that an iron-fisted, governmental authority was always capable of seeing any defection from the expected modes of cooperative behavior. The fear of such detection alone was enough incentive to deter defection and transform a competitive prison environment into a cooperative one. The design of many American prisons follows the theory of Bentham's panopticon:

[G]uards may constantly spy on any and all of their prisoners but may not always be watched in return. Prisoners are constantly reminded of surveillance by the towers in which their captors reside, the cameras trained on them, or other artifacts, yet, the perfection of the panopticon is achieved by the fact that prisoners never know exactly the moment when they are watched. Given this condition . . . individuals conspire in their own discipline, not knowing when they might be caught for doing something socially illegitimate . . . [T]his system of power . . . operates directly on individuals without physical intervention.¹³²

In this environment, the nature of the empathy generated in the inmates does not wholly correspond to any of the three dimensions of empathy that make up "otherness," though it is a form of "cognitive empathy." However, it differs from the paradigm of cognitive empathy that is part of otherness because the "other" in this case is not another *person*. Rather, it is the *system* of prison discipline itself. That is to say, inmates develop an intricate cognitive empathy for the system as they work to understand its rules for strategic purposes of self-defense. But this learning and survival process

¹³⁰ See *id.*

¹³¹ See generally HOBBS, *supra* note 76, *passim*.

¹³² See, e.g., Kilgore, *supra* note 120, at 152 (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200-02 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978)).

leaves little room for empathy with other individuals because it dominates the psyche of the individual actors who, as a result of the system of prison discipline, view themselves perpetually as potential victims of its omnipresent, punitive, yet invisible force:

An individual may become intimately attached to and aware of "the system," but the system is not a being that inspires sympathy in individuals. The system requires a kind of cognitive empathy in individuals, who must constantly anticipate and gauge its response to their actions. Furthermore, although the system can inspire a great deal of emotion in individuals—frustration, fear, anger, and even joy and relief—this is not a joining with the system in its perceived feelings but rather a response to how the workings of the system have played out in the life and dignity of the individual.

Each new procedure and prohibition that is imposed to perfect the prison's system of discipline and punishment makes it more difficult, if not impossible, to apply perfectly. Consequently, there is a genuine condition and sense of arbitrary application. In the face of arbitrary application of discipline, inmates must use their powers of cognitive empathy in relation to people in authority to determine from day to day, from situation to situation, the safest (if not necessarily the most lawful) course of action.¹³³

In the psychological environment of the prison, the researchers found that individual authenticity is rare, making emotional empathy for "other" inmates near to impossible. Instead of reaching out to others, individual inmates erect defensive barriers around the "self" out of the perceived need to protect the "self" from the "other"—that is from other inmates. This state of anxiety-ridden existence is further exacerbated by the prison rules that "discourage social interactions of any kind (whether economic or emotional) among inmates."¹³⁴ Nevertheless, there is status, a form of "capital," to be gained interactively, but it is a reward structure that is inherently antisocial and encourages defection from prison rules:

The concept of symbolic capital helps us to understand how practices that are valued in one field may be inappropriate in another field. For instance, women in prison who "walk hard"—who look masculine and adopt masculine mannerisms—are valued by other inmates. Inmates who act out and get into fights, or "bad actors," also have status in the prison. On the other hand, masculinity and aggression of this sort in women in the

¹³³ *Id.* at 153.

¹³⁴ *Id.*

wider world are not likely to carry great symbolic weight, but rather are likely to lower one's status.¹³⁵

It would seem that, as in the single-round structure of the Prisoner's Dilemma game, the structure of real prison life, in terms of evolutionary biology, "selects for" defection from a norm of cooperativeness and favors competitor-like behavior in interpersonal relations. This is because the prison system norms of behavior aim at keeping instances of interpersonal interaction to a minimum. This maximizes the prison's control over the individual by averting cooperative group activity among the prisoners that could threaten prison discipline. This results in a pay-off structure in prison that rewards masculine female behavior because it is anti-social, but that would result in the prisoner's "enduring marginalization" outside the prison context because of the "free world's" gender-based norm disfavoring "masculine behaviors" in women.¹³⁶

One question that this real-world study of prisoner behavior brings to mind is whether Lax's and Sebenius' theory of the Negotiator's Dilemma, and its progeny, are the products of decidedly masculine modes of thought and models of discourse. That is, is the Negotiator's Dilemma the result of a male-centered Dilemma in American culture? Put another way, might gender-based behavioral incentives in the "free world" that favor high empathy and cooperativeness in women and low empathy and competitiveness in men reduce the occurrence of the Negotiator's Dilemma in the "free world," *i.e.*, outside this prison context, when women negotiate with men or when women negotiate with women?¹³⁷ Do such questions require us to reframe Trina Grillo's observations about the tendency of women to "lose" themselves to their male counterparts in divorce mediation as the product of cultural, rather than wholly interpersonal, domination of the female voice by the male voice in mainstream, "free world" discourse?

Whatever the answers to such questions, the extent to which we *engender*—that is, *inspire*—others to empathize with us and also develop empathy for others in dispute resolution discourse may be dependent upon broadly cultural (including gender-specific) *and* situational "pay-off" structures that act as incentives to empathy or deterrents to its development in keeping with insights drawn from both real-world and laboratory Prisoners' Dilemma scenarios. A recent psychology experiment concerned the workings of such a pay-off structure and also produced evidence of the cultural predispositions of subjects in the absence of incentive structures. The experiment tested the relationship between the subjects' gender differences

¹³⁵ *Id.* at 149.

¹³⁶ *See id.*

¹³⁷ *See supra* notes 88–89.

and their *motivation* to be empathetic.¹³⁸ It also tested gender-based differences in the subjects' "empathic accuracy." The conclusion reached was consistent for both the male and female participants:

payments in exchange for accuracy improved the performance of both men and women and wiped out any difference between men's and women's performances. Together, the results suggest that gender differences in empathic accuracy performance are the result of motivational differences and are not due to simple differences of ability between men and women.¹³⁹

However, before the motivation of "payment for empathic accuracy" was interjected during the second round of the experiment, women's performance indicated that they *were* culturally more motivated than men to be empathetic.¹⁴⁰

Some of the most recent experimental variations of the Prisoner's Dilemma game involve the interjection of empathy as a variable in inducing or inspiring altruistic, cooperative behavior, rather than competitive-oriented defection.¹⁴¹ An important insight of these games may be that variables motivating empathy are manipulable and should, therefore, be susceptible to conscious introduction in dispute resolution contexts. This is the case, even though it may be that culture-specific and biology-specific variables predispose one gender, more than the other, to feel and demonstrate higher levels of empathy in a given relational context. Indeed, Carol Gilligan's work on the ethics of care and justice suggests that while both genders have the capacity for speaking in the "voice" of either ethic, one of the two ethics usually seems to predominate in relation to the other, leading two people experiencing the same situation simultaneously to see it differently and to speak about it differently. This suggests that a fundamental challenge for parties and practitioners involved in dispute resolution is to listen for these different voices in themselves and in the "other" as a means of redirecting the conflict caused by difference from counterproductive to constructive ends. By transforming conflict into a complementary process which can engender greater awareness of points of difference and elicit reciprocal empathy, a

¹³⁸ Kristi J.K. Klein & Sara D. Hodges, *Gender Differences, Motivation, and Empathic Accuracy: When it Pays to Understand*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 720, 721 (2001).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., Batson & Ahmad, *supra* note 94, at 26–27, and accompanying text (discussing extended research findings involving empathy-induced altruism as a powerful antidote to reciprocal defection in a Prisoner's Dilemma game).

communication process may ultimately develop that pushes the parties through barriers of conflict, competition, self-deception, and misunderstandings to greater levels of mutual awareness, paving the way for them to craft more just agreements that meet their separate and shared human needs.

Towards the end of the Explorations program involving the teaching of empathy to female inmates in a Texas prison, the group-learning process succeeded in helping the previously defensive, antisocial subjects—the women prisoners—to feel and demonstrate empathy for each other. In the process, each became more self-aware and able to bridge communication gaps between the “self” and the “others” that had previously typified their divisive interpersonal relations. As the researchers who conducted this program explained, other-awareness became the key to achieving greater self-awareness in these real-world prisoners:

Empathy is a source of connection to specific others that can cause us to come to feel more positively toward people in general. This connection to others becomes a source of self-definition, as we come to see ourselves reflected in another's moods. Empathy becomes a *hermeneutic circle*, “as we empathetically join others in feelings and reactions that *we evoke in them, as we thus share with them their feelings about us, we proceed to experience and then to conceptualize and define ourselves.*”¹⁴²

Through the confrontation of conflict with others, therefore, we enter into a circular, synergistic dynamic that enables us to see the impact we have on the feelings of others and, in turn, see ourselves in the mirror of “the others”’ feelings and responses to us. That is, through “joining,” or behavioral empathy, we move beyond a conception of ourselves that is wholly self-centered to a conception of the self that is *both* self- and other-centered. When this process occurs reciprocally in negotiation, *i.e.*, in both the self and other, it may be the key to freeing both sides from the recurring “dilemma” of viewing the forces of competitiveness and cooperation, and the entities of the self and the other, as necessarily in tension. Rather, the forces of competition and cooperation, as well as the entities of the self and the other, may come to be seen as existing in complementary, synergistic relation to each other, like the Yin and the Yang.

¹⁴² See, e.g., Kilgore, *supra* note 120, at 158 (quoting Staub, *supra* note 119, at 100) (emphasis added) (citations omitted).

C. *Entering the Hermeneutic Circle*

The Hermeneutic Circle, like the Prisoner's Dilemma game, is not a "circle of one." It is a complex web of interdependent, human relationships. In it the individual can transcend the Prisoner's and the Negotiator's dilemmas through the synergy created by the dynamic interdependency between the self and the other. The first of the dual concepts conveyed in the phrase "hermeneutic circle" originates from the Greek word "hermeneutic," originally denoting the art and science of interpreting, explaining, and making clear what the Scriptures mean.¹⁴³ The second of the dual concepts—the image of the "circle"—comes from the ancient spiritual practice of convening tribal members in the configuration of a circle for the purposes of peaceful dispute resolution.¹⁴⁴ This image of the "circle of many" symbolizes the primacy of group entities—i.e., the "we" rather than the "I"—in the life of communities and cultures. As so conceived, this Article suggests that the idea of the Hermeneutic Circle becomes the heuristic framework for negotiating justice and human needs in the modern context of ADR practice.

Because disputing is a ritual of engagement that calls upon the individual to engage with the "other," it is a form of community and communal activity. The Hermeneutic Circle, as a "circle of many," signifies that conflict as well as its successful processing and enduring resolution necessarily involves more than just one person. At a minimum, it is a circle filled by the self and the other, like the image of the Yin and the Yang. Often, however, disputes involve more than the nominal parties, that is, they may involve interested third parties or "others" who are part of the psychic make-up of each individual participant (such as absent parents or grandparents). All of these present or absent parties may be part of the Hermeneutic Circle. Therefore,

¹⁴³ The term "hermeneutic" originally referred to missives from Hermes, the Greek god who was messenger of the gods. In post-pagan times it has come to refer to the art, science, and methodology of interpreting scriptural and other spiritual communications, including, for people who view all sincere human discourse in a reverential light, those interactions between people that inspire and result in the unburdening of the soul. See *Hermeneutic*, AMERICAN HERITAGE DICTIONARY, *supra* note 33 (describing hermeneutics alternatively as the "science and methodology of interpretation, especially of Scriptural text" and "the art of interpretation"); see also *Hermeneutic*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1969) (defining "hermeneutic" as an adjective meaning "of or relating to hermeneutics, interpretive; explanatory; skilled in interpreting").

¹⁴⁴ See, e.g., Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 HAMLINE J. PUB. L. & POL'Y 419, 432–34 (1999).

entering into its complexity in the course of processing a dispute through ADR may take coaching by helpers who are more highly skilled at interpreting, understanding, and explaining the psychology of these forms of "otherness."

The prisoners in the Explorations program learned "joining empathy" with the assistance of third-party interveners who facilitated small group learning sessions. Similarly, patients in mental hospitals or surgery wards were "enabled" to heal when healthcare providers conveyed emotional, cognitive, and behavioral empathy for them. And lawyers and litigants engaged in protracted health-related tobacco settlement negotiations were better able to manage the complexity of those cases after they had listened to victims' narratives conveying what being harmed by addiction to tobacco meant to them. The common element in all of these "enabling" contexts is the empowerment of individuals through awareness of others. Not only may this empowerment be central to the development and exercise of constructive social skills by negotiators and dispute resolvers, it may also be central to our very survival as human beings.¹⁴⁵ The other-awareness skill that is central to self-empowerment is "empathy." The enabling context for its development is the Hermeneutic Circle.

1. *The Hermeneutic Circle and the ADR Practitioner*

How can the ordinary professional negotiator or mediator create such a metaphorical realm as the Hermeneutic Circle for the exploration of self and other? First, it may be that the best context for learning the skills associated with feeling and expressing empathy is small group learning environments.¹⁴⁶ Psychology literature focusing on social movements

¹⁴⁵ See Robert Plutchik, *Evolutionary Bases of Empathy*, in *EMPATHY AND ITS DEVELOPMENT*, *supra* note 119, at 41, 43–44.

¹⁴⁶ I first articulated what became the beginning of this heuristic framework in a "think tank" meeting preliminary to planning for the revised version of the Harvard Law School Negotiation Workshop under the leadership of Robert Mnookin. See *supra* note *. The meeting took place in February of 1994, only weeks after Roger Fisher had passed the reins of the course to Mnookin. (Fisher had officially retired the year before but had continued to lead the course for the first year that Mnookin spent as a full member of the Harvard Law School faculty after moving from Stanford to Harvard). Mnookin was eager to "reform" aspects of the Fisher model and so it was in this spirit of "reform," that he convened a meeting of veterans of the Fisher model, such as Frank Sander and myself, to discuss aspects of our individual approaches to the course which had differed from Fisher's, and what we would like to build on under Mnookin's leadership. At that meeting (attended, as I recall, by Frank Sander, Bruce Patton, and me), I suggested to Mnookin—who was dubious about continuing with the "Interpersonal Skills" segment of the course (in which the instructor works privately with two or three students during intensive, multi-hour sessions, with or without the aid of a psychologist)—that in my

experience this segment of the course was among its most important attributes from a standpoint of broadening students' interpersonal skills repertoires. I also spelled out for him the importance of the skills covered, noting that the skills that had most frequently been the subjects of my intensive interpersonal skills training sessions with students during the previous eight years of my teaching the Workshop as an assistant to Frank Sander, were "empathy" and "assertiveness." See *infra* note 160. After elaborating further on how I envisioned the relationship between these skills, I remember Mnookin pausing for a moment and then jumping up to the blackboard with excitement in the old Map Room in Pound Hall. He then drew a graph on the board—the same two-dimensional graph that he had always used to plot the Pareto optimality of the various "tendencies for coping with conflict" associated with his version of the Thomas-Kilmann Modes Exercise (see *supra* Figure 4, & notes 98–105 and accompanying text)—modifying it this time by labeling the axis going north "assertiveness" and the axis going east, "empathy." He then suggested that the mid-way point on the Pareto Frontier corresponded with the point where "Problem Solving" lay. (Mnookin later adopted a substitute label, "The Effective Negotiator," see *supra* note 105.) To Mnookin, this graph represented the prescriptive desirability of negotiating with a balance of "empathy and assertiveness." It also had the visual and conceptual effect of representing the two skills of assertiveness and empathy, like their Thomas-Kilmann counterparts, as being in a state of apparent tension (like the concepts of competition and cooperation and the corresponding entities of the self and the other, see *supra* notes 42–44, 98–100, and accompanying text). I was attracted to Mnookin's conceptualization following my remarks about empathy and assertiveness, and for some time thereafter I saw aspects of the conceptual relationship between empathy and assertiveness through the prism of his bi-linear graph.

At the end of this meeting Mnookin asked me to develop an "empathy and assertiveness" domain for the new course. Shortly thereafter, at Mnookin's request, Dean Robert Clark appointed me Lecturer on Law to become a member of Mnookin's "new" teaching team for the next two years, and I received funding to write about empathy and assertiveness. Within two months I had produced a lengthy draft article for the think tank to review. Amended versions of it were used as supplemental readings for the following two years of the Harvard Negotiation Workshop. See *supra* note *. During this period, Mnookin had hired two research assistants to help him produce his own textbook for use in the course (until that time GETTING TO YES had been the primary book used). In the interim, Mnookin published a short write-up on "the tension between empathy and assertiveness" through the Harvard Program on Negotiation's own publication, NEGOTIATION JOURNAL (making his then research assistants, Scott Peppet and Andrew Tulumello, his co-authors). See Robert H. Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOTIATION J. 217, 227 (1996). By this time, Mnookin had also fully adopted the "tension between empathy and assertiveness" as a central theme in his textbook-in-progress, which was published four years later. See MNOOKIN ET AL., *supra* note 38, at ix–xii.

With the benefit of hindsight and reflection, I see limitations in Mnookin's use of the bi-linear graph to represent the skills of empathy and assertiveness. That is, I see both skills as being far too complex and overlapping to be represented on a two-dimensional, graph, even for pedagogical purposes. For example, I see the skill of empathy as being central to the individual's development of higher levels of *self*-awareness, in relation to

suggests that adult learning often occurs most effectively in small groups, such as voluntary associations, corporate education groups, and governmental work teams.¹⁴⁷ One explanation is that small group learning is optimally interactive in nature. It therefore reproduces the context of a negotiation in which only a few parties are involved and where there may be greater opportunity for detailed, personal communication. In small groups, as in mediation and multi- or two-party negotiations, for example, “[i]ndividuals . . . do more than trade individually produced cognitions. They also engage in active reconciliation and integration processes, leading to the emergence of unique, collectively produced conceptualizations—including ideas, representations, solutions, and arguments—that no individual had to begin with.”¹⁴⁸ Thus, in group learning contexts adults can learn the very communication skills necessary to experience empathy. For lawyers and lay practitioners of ADR, Continuing Legal Education offerings such as those operated by law school institutes or programs whose focus is on negotiation

her own needs, etc., *as well as* to her ability to *assert* those needs effectively in relation to the *other* person. *See supra* note 142 and accompanying, preceding, and following text, and *infra* note 172 and accompanying text. I therefore have come to conceptualize the skills of empathy and assertiveness as constantly overlapping and merging and often moving in harmony and in the same direction with each other as they work to effect the parties’ communication in the negotiation process. Because they can work synergistically and in complementary concert with each other, helping the parties to satisfy their respective needs and the needs of each other as they engage in intertwining communication, I see their visualization better represented in a three-dimensional, globe-like sphere, with multiple intersecting lines of longitude and latitude representing each party’s potential for curvilinear progression in relation to the other through joining empathy. *See infra* Figure 5, and Part III.C.2.c.iii. *See also supra* note 45 and accompanying text and Part III.C. As seen in Figure 5, the backdrop of this globe-like sphere is the ancient image of the Yin and the Yang, representing the possibility that through joining empathy, the global sphere can be filled by the self and the other, and can also fulfill the self and the other. For me, this three-dimensional image affords a richer and complementary conceptualization of the theory and practice of “assertiveness and empathy” than does the two-dimensional conceptualization of them. Also, in my own experience designing small-group, interpersonal skills sessions in consulting contexts with family service and dispute resolution professionals, as well as with students in the law school setting, this view of the skills has helped participants to understand them and learn to put them into practice. *See infra* note 160 (reporting that over the course of years of teaching intensive interpersonal skills sessions, students’ exercise of skills related to empathy, rather than those perceived by students to be associated with “assertiveness,” more often give students a greater sense of self-determination and fulfillment in negotiation).

¹⁴⁷ *See, e.g.,* Kilgore, *supra* note 120, at 146.

¹⁴⁸ *Id.* at 147 (quoting D. H. Gruenfeld, *Sociocognition in Work Groups: The Evolution of Group Integrative Complexity and Its Relation to Task Performance*, SMALL GROUP RES., 24(3), at 383–405 (1998)).

or ADR may provide small-group learning opportunities.¹⁴⁹ As a preliminary matter, however, this Article suggests that negotiators, mediators, arbitrators, and even judges,¹⁵⁰ can help themselves achieve “joining empathy” with the “other” by understanding better the component parts of empathy that lead to greater “self” and “other” awareness.

A vast literature in the field of psychology delineates the various types of empathy identified earlier as emotional or affective empathy, cognitive empathy, and behavioral or joining empathy.¹⁵¹ Recall that the *cognitive* type of empathy is defined as apprehending the “inner world” of another by developing “an awareness, an understanding, a knowledge of another’s state or condition or consciousness, or how another might be affected by something that is happening to him or her.”¹⁵² This involves the “ability to *know* what another person is feeling without necessarily joining them in that

¹⁴⁹ For information on such education systems design, please contact the author at P.O. Box 117625, Gainesville, FL 32611-7265, or by e-mail at, sanchez@law.ufl.edu.

¹⁵⁰ The importance of “empathy” to dispute resolution is not only limited to ADR processes. Judge Richard Posner recently reflected provocatively on the importance of empathy to the effective dispute resolution function of appellate judges, whose legal opinions cast a broad shadow over society in general, and are not just limited to crafting a resolution specific to the parties in dispute:

I . . . take the cognitive significance of emotion so seriously as to be unwilling to constitute reason the tribunal that reviews the emotions and decides which the law should encourage (tolerance, perhaps, not disgust) . . . The other emotion that is important for the judge to feel when he is faced with a case that cannot be decided by purely formalistic reasoning is empathy or fellow feeling. Empathy is one of the best examples of the cognitive character of emotion. The cognitive element in empathy is imagining the situation of another person; the affective element, which marks empathy as an emotion and not merely a dimension of rationality, is feeling the emotional state engendered in that person by his situation. The importance of empathy in the performance of the judicial function is to bring home to the judge the interests of the absent parties This is the tendency . . . to give too much weight to the . . . feelings, the interests, and the humanity of the parties in the courtroom and too little to the absent persons likely to be affected by the decision.

RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 243 (2001).

Having empathy for both sides (and for the effect of possible outcomes on absent parties) is also important for the legal advocate engaged in litigation. For example, Archibald Cox recounted to me that he frequently began his arguments before the U.S. Supreme Court by making the best case for the other side to persuade the judge that he understood the other side’s position. He would then proceed to make an even more persuasive case for his own side.

¹⁵¹ See *supra* notes 119–22.

¹⁵² Staub, *supra* note 119, at 104; see also *supra* note 121.

feeling.¹⁵³ In practice, this type of empathy “can be a useful source of information to individuals who, for instance, must navigate around others’ bad moods, especially when those others dominate them.”¹⁵⁴ By comparison, the *emotional* type of empathy (also called “affective” empathy) occurs when the “feelings or condition” of the person who is the object of empathy generates “strong vicarious emotion” in the “empathizing person.”¹⁵⁵ The *affective* components of *emotional* empathy are often demonstrated by expressions of feelings for the other that do not necessarily involve significant levels of cognitive processing of those feelings but that result in “joining” or *behaviorial* empathy. This affective component of emotional empathy was demonstrated in the Explorations project at the Texas women’s prison when one inmate in the group cried and those empathizing with her emotionally immediately made sounds of lamentation such as “Awwwww” or “Ohhhh.”¹⁵⁶ Though the extent to which the emotionally empathizing women understood—or had *cognitive* empathy for—the pain expressed by the crying woman may have varied, each achieved some measure of *behavioral* or *joining* empathy in relation to her because each “perceive[d] and then join[ed] [her] in . . . her feelings . . . [experiencing the] kind of empathy that [can] involve[] both cognition and affect in fairly high doses.”¹⁵⁷

Therefore, as one explores the circumference of otherness, the “self” may apprehend the “other’s” inner world, achieving *cognitive* empathy, but may or may not experience *emotional* empathy or join with the other in *behavioral* empathy. Yet it is in this process of reaching toward otherness that the “self’s” own pre-existing level of “definition” can be enhanced with “new self knowledge,” developed alongside the explorations of the other. This results from the synergistic dynamic in the acquisition of self- and other-knowledge. For example, the original purpose of the Texas Explorations project was to “provide participants with the means to explore and develop those aspects of their identities that might empower them to meet and conquer hardships in their everyday lives.”¹⁵⁸ To this end, the researchers “endeavored to facilitate development of this self-definition through group learning The[y] provided structured opportunities for participants to work together, contributing their experiences to the whole group and creating *new knowledge* together through collective critical

¹⁵³ Kilgore, *supra* note 120, at 152 (citing Staub, *supra* note 119, at 107).

¹⁵⁴ *Id.*

¹⁵⁵ Staub, *supra* note 119, at 106; *see also supra* note 120.

¹⁵⁶ Kilgore, *supra* note 120, at 152.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 150.

reflection.”¹⁵⁹ Thus, the gaining of “new knowledge” of the “self” was a process interdependent on the gaining of “new knowledge” of the “other.” As a result, while the stated focus of the study was originally the development of “Self-Definition” in the individual inmates, the focus was shifted to the logic of empathy as a “crucial aspect of prison life,” and also as central to the development of “individual identity.”¹⁶⁰

In rounding the circumference of the Hermeneutic Circle, the “self” can move from understanding the “other” (cognitive empathy) to feeling what the “other” feels (emotional empathy), or vice versa, and ultimately to “joining” with the “other” (behavioral empathy) through demonstrative sharing of what the “other” feels. The bright line between the “self” and the “other” shifts when joining occurs as the feelings of the “self” actively merge with the feelings of the “other.” In this process, the lines of awareness within the “self” can be seen as shifting in relation to those dimensions of the “self” that come into being in complementary or synergistic relation to the “other.” This is because within the “self” there are many “others” whose feelings as “inner selves” are often not known to the “outer self” or fully understood by the outer self. By engaging in the probing of “self” and “other,” the outer self is actually brought “into empathy” with the inner self, and this process of self-definition enables the “self” to develop “otherness.”

a. Cognitive Empathy

What does the “other” feel and how can the “self” come to “understand” it? This is the central question involved in reaching a level of *cognitive* empathy for the “other.” Consider the following scenario. Negotiator S (Self)

¹⁵⁹ *Id.* (citing M. C. Clark et al., *Incarcerated Women's Identity Development: Becoming a Self at the Margins*, Paper presented at the 39th Annual Adult Education Research Conference, San Antonio, TX (1998), available at <http://www.edst.educ.ubc.ca/aerc/1998/98clark.htm> (emphasis added)).

¹⁶⁰ Kilgore, *supra* note 120, at 150; see also Clark, et al., *supra* note 159. This transformation from self-definition to other-definition, and ultimately the achievement of greater self-definition, corresponds with an observation I have made during sixteen years of teaching negotiation (at Harvard, the University of Florida, and in professional consulting contexts). During the intensive interpersonal skills segment of my teaching, most participants come prepared to work on the skill that they think is their weakest. Usually they describe that skill as “assertiveness.” More often than not, during the course of role-plays I ask them to experiment with “empathy” skills, and more often than not these sessions unlock the realization that the skill at which they were most deficient was not assertiveness, but empathy. Most often they come to feel a greater sense of self-determination (the end they had hoped to achieve through “assertiveness”) by exercising empathy skills. This realization corroborates the experience of the Texas prisoners.

sits talking with Negotiator O (Other) in an air-conditioned building frequented by both S and O. At some point in the meeting, O comments that the building is unusually cold. S understands O's comment to mean that O must feel cold and at that point S has reached a level of cognitive empathy for O. Yet S neither feels cold nor feels that the building is unusually cold. S then notes that O is wearing a sleeveless silk dress, instead of her usual business suit, and that, by comparison, S is wearing her usual business suit. Therefore in addition to understanding that O feels cold, S now also understands why O is feeling cold. S has therefore reached a more heightened level of cognitive empathy. As a result, S may now hold a single perspective of the situation in her mind—that O is cold because she is under-dressed. But that understanding or perspective does not result in S feeling cold herself or in S adopting O's perspective that the building is unusually cold. So S does not have to feel the cold as O feels it, or attribute its cause to the building's temperature as O attributes it, to understand that O is feeling cold and also to understand O's perspective of why she is feeling cold.

Taking the perspective of others can be a helpful step in reaching "optimal levels" of *cognitive* empathy for the purposes of dispute resolution. "Perspective taking" amounts to donning the *mental mantel* of the "other" or seeing a situation through her eyes.¹⁶¹ When a negotiator takes the perspective of her counterpart, she does not have to forsake her own, different perspective. Nor does she have to feel what her counterpart feels. Another example of this type of empathy is the following. Suppose you are a member of an ethnic group that has been engaged in fierce and long-standing warfare with another competing and hated ethnic group. During the course of negotiations designed to reach a peaceful accord, you are asked to understand that the other side views you and your group as cold-blooded murderers. You know that in seizing territory to which your group claims an ancestral right, your group killed people from the "other" side who engaged in battle defending the territory. From your group's perspective, the "other" side had no historical right to the territory and so they were "rightfully" killed in the process. The animosity inherent in the intergroup conflict and your identification with your group's ideology and version of history may make it impossible for you to feel what the other side feels for you (*i.e.*, hatred) or to see your actions as they see them (*i.e.*, as atrocious crimes against humanity). Nevertheless, when you understand what the other side feels and why, you have taken in their perspective of you and the situation. You have experienced *cognitive* empathy. But you have not experienced the other types of empathy—*emotional* and *behavioral* empathy. You have not "felt" against yourself the feelings they feel against you (*emotional* empathy) or expressed

¹⁶¹ Kilgore, *supra* note 120, at 158–60.

those feelings in discourse with the other side (*behavioral* empathy). Therefore, even if you understand their perspective (*cognitive* empathy), you cannot engage in joining or *behavioral* empathy with the other side because you have not felt for yourself what the other feels for you, and cannot therefore join in their feelings.¹⁶²

b. *Emotional and Behavioral Empathy*

While feeling what others feel (*emotional* empathy) often requires imaginative capacities that may seem to be common only to novelists or poets, this level of empathy can be reached by most of us through a process of transference. That is, if we have experienced something that our negotiation counterpart is presently experiencing, we may voluntarily or involuntarily reach *emotional* empathy by recalling how we felt under similar circumstances. A simple but poignant example of this phenomenon was recounted by the son of a former U.S. Secretary of State. When the Secretary of State (Secretary) entered into negotiations with a foreign ambassador (Ambassador) who was well known to him, and the latter seemed troubled, the Secretary asked him what was wrong. The Ambassador confided that his dog had just died of old age and that he was grief-stricken. The Secretary proceeded to console the Ambassador by first putting his arm around the Ambassador's shoulders and then reflexively beginning to weep. Within moments, the Ambassador himself started to cry. After both had regained composure, the Secretary explained that he too loved dogs and had also recently lost his elderly golden retriever. The Secretary had thus experienced *emotional* empathy for his counterpart because he had actually felt what the Ambassador felt in his period of grief. The Secretary's ability to feel *emotional* empathy for the Ambassador was clearly facilitated by his own recent experience of the same feelings of pain and loss that the Ambassador himself now felt. But in addition to feeling *emotional* empathy for the Ambassador, the Secretary was also open enough to be able to *express* this emotional empathy for the Ambassador by crying for and with him (and perhaps also for himself). He therefore reached the third level of empathy—*behavioral* empathy—and "joined feelings" with his fellow diplomat.

¹⁶² See Ralph K. White, *Misperception in the Arab-Israeli Conflict*, 33 J. SOC. ISSUES 190, 191 (1977).

c. Tools for "Getting to Empathy"

How can negotiators engage in and foster empathetic exchanges? One recent psychology study seeking to fill conceptual gaps in our understanding of how we can integrate relational perspectives in cross-cultural working alliances concluded that important "relational domains" were: empathy, mutuality, the dynamics of power and authority, the use of self, and the process of communication.¹⁶³ In cross-cultural contexts (and also in culturally homogenous contexts) it is important for both sides to *value differences* of all types as sources of tangible and intangible richness. In this sense, "valuing differences" does not just mean "differences in valuation." To be sure the latter can result in value creation or joint gains through trade-offs of resources that are valued differently by the parties. But the meaning of "valuing differences" here is broader to the extent that it encompasses not just differences in valuation that come to light as a result of each side's stated preferences, interests, perceptions, modes of expression, etc., but also those "human differences"—such as racial, gender, or cultural differences—that are of value because they give rise to a diverse panoply of experience, perspective, and creativity based on those differences of experience and perspective.

In addition to "valuing" a broadly defined spectrum of "difference," each side in a dispute should strive to talk openly about its different perceptions, viewpoints, preferences, etc., so that each can "understand" the other's interests and learn from the amalgam of differences.¹⁶⁴ Through this process, both sides can achieve *cognitive*, as well as *emotional* and *behavioral* (or *joining*) empathy, and develop working relationships that establish the foundation for dealing constructively with competitive and cooperative issues.¹⁶⁵ Also, every negotiator and dispute resolver should view achieving *behavioral* empathy as a skill that can be learned (and taught) and that is central to effective problem-solving communication and constructive bargaining—that is, to the negotiation of justice and human needs.

¹⁶³ See Shoshana Shonfeld-Ringel, *A Reconceptualization of the Working Alliance in Cross-Cultural Practice with Non-Western Clients: Integrating Relational Perspectives and Multicultural Theories*, 29 CLINICAL SOC. WORK J. 53–63 (2001).

¹⁶⁴ For a detailed discussion of "difference," see *supra* Part I.B.

¹⁶⁵ See WILLIAMS, *supra* note 41, at 34–39 (discussing competitive effective/ineffective and cooperative effective/ineffective negotiation behaviors); Evert van de Vliert & Martin C. Euwema, *Agreeableness and Activeness as Components of Conflict Behaviors*, 66 J. PERSONALITY & SOC. PSYCHOL. 674, 687 (1994) (defining "agreeableness" as concern for the goals of another, and "activeness" as concern for one's own interests).

Many negotiators may resist the idea of empathizing with the other side because of a perceived tension between their side's interests and those of the other side. In contexts like the Texas women's prison, or the conflict between the Greek and Turkish Cypriots, or the Israelis and the Palestinians in the Middle East, or the Catholics and Protestants in Northern Ireland, it may be next to impossible for the "self" to cultivate a sense of independence from its group especially when the dynamic of "group" survival in the "logic" of such ongoing conflict situations can all but extinguish the individual's sense of "self." However, particularly in conflict situations such as these, the individual *can* make a difference in breaking through the logic of embattlement between the self and the other by beginning the process of "otherness" that envisions the partisan perceptions of the "other" and how those perceptions may work to foreclose the unification of "self" with "other" in *emotional* or *joining* empathy. Seeing beyond the borders and barriers of the conflict to a joining empathy with "otherness" is essential to disarming the conflict that works so predictably, and with such assurance, to unify one side *against* the "other" in complex conflicts of difference, rather than unifying each side *with* the other.¹⁶⁶

2. *The Resolution of Conflict in the Hermeneutic Circle*

Conflict is as inevitable as its resolution. However, how one handles conflict can dictate just how much space and time will be necessary to effect its successful processing. This is particularly so when one's interests are opposed to the "other's." Here it becomes crucial for the negotiator to be able to engage in the analysis of "otherness." Paradoxically, as we achieve empathy for the other side (as opposed to competing with it by engaging in self-centered behaviors) we will be more likely to behave in a way that begins to break the logic of the conflict, introducing instead the logic of dispute resolution.

Whatever our range of skills, none of us has perfected the array of responses needed at all times and in all spaces to reach desired levels of empathy with others, to express that empathy adequately, or to convey our own interests effectively. And the likelihood is that we will never accomplish this feat flawlessly. But we can improve our powers of perception, cognition, and expression and learn new abilities as well as acquire ways to exert greater control over our existing behavioral repertoires. When we successfully empathize with others and they successfully empathize with us, barriers to communication may crumble, leaving both sides better able to

¹⁶⁶ See SIMMEL, *supra* note 72, at 20–25.

behave constructively and build problem-solving working relationships. One way to begin this process is to describe what feelings or actions in yourself or others move you to behave empathetically. For example, if your negotiation counterpart behaves in a blustering or swaggering manner, or takes liberties, lays down the law, or is overbearing how might you respond? Will you respond with coolness, openly reactive hostility, or with passive aggression? Could you empathize with such a person? If so, how would you empathize with him or her? What would your expression of empathy look like? What would you want the effect (or impact) of your expressions of empathy to be on the other person? Could the effect be different from what you intended it to be? If so, how could you change your expressions so that the intent and impact were the same?

A negotiator's ability to *communicate* effectively may require that she learn to broaden her capacity to be expressive. The core skills associated with effective communication in dispute resolution contexts (as in daily life) are active listening and persuasive expression. Some key aspects of both are:

1. Hear the other person with an open mind;
2. Inquire for clarification and to learn;
3. Ask questions until you think you understand the other person, and check the accuracy of your understanding by stating it and then inviting the other person to confirm or correct it;
4. Express surprise, doubt, hurt, dismay, or delight, etc. if you feel any of these (*i.e.*, be emotionally and intellectually authentic);
5. Affirm the legitimacy of what the other person thinks or feels (whether or not you agree with those thoughts or can empathize with those feelings), and;
6. Invite the other person to affirm the legitimacy of what you think and feel (whether or not he or she can agree with your thoughts or empathize with your feelings).

Before engaging in such a communication process, particularly in conflictual situations, it may be helpful to *contract* with the other side about proceeding in a constructive way. For example, you might say: "I want to understand how you see things and also want to share my views with you. I hope you will agree to engage in such an open and mutual exchange with me."

Each of us can become more aware of why we behave the way we do, of how our behaviors are seen by others, as well as the results to which they lead. With or without coaching help, we can work to alter behaviors that we consider counterproductive or strengthen those we consider productive but

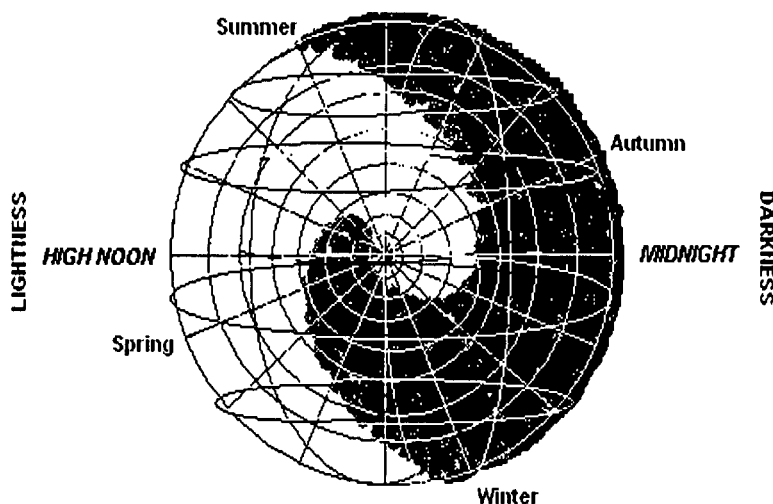
which are under-developed in our skills repertoires. When we analyze our interpersonal skills repertoires it is important to remember that each of us behaves differently in different contexts. Therefore, we must begin to view each negotiation as an interaction which calls upon us to be flexible and not formulaic in our responses. Depending upon the subject under negotiation and the context (whether it is litigation or transaction-related), each negotiator's purpose and approach, and the effect which each person's behavior actually produces, can be multifarious. The question then becomes, how can we conceptualize and measure optimal behavior in ourselves and inspire the same in others?

Deciding what behaviors are optimal for any person in any context is largely a subjective process. Observing others and engaging in feedback sessions with those whom you have observed and who have observed you is essential to your learning process. Questions for consideration in these feedback sessions are: Did you and the other side successfully assert the interests that were important to yourselves or your clients? Did you both adequately explain your views of the situation? Did each of you understand/take the perspective of/feel each other's views, etc., and express that empathy to the other side? Did the other side feel empathy from you? Did each of you work to enlarge the pie, search for joint gains, identify difference as a source of conflict and creativity, and engage in the principled distribution of value? Whatever your successes and shortcomings in any negotiation, it is important to keep in mind that the learning process is a dynamic one, and that each of us grows and improves continually. Accordingly, the baseline for measuring the optimality of our performance is always changing.

It is also important to keep in mind that feelings of antipathy towards the "other" may "block" our ability to be empathetic and may lead us to engage in counterproductive behaviors. Similarly, one's inability to express empathy, even if one feels it, may also lead to destructive behaviors in ourselves or others. Under these circumstances the interactive tension between "self" and "other" may seem irresolvable, leaving unaddressed an array of underlying human needs that could have been satisfied on both sides. In these situations, our lack of empathy for others may not only work to block our understanding of the "other side," but if it is occasioned by a lack of knowledge or wisdom, or closed-mindedness, it may blind us to certain realities about ourselves, our own perspectives, and our view of our own interests, let alone our view of the possibilities for resolution that are within our reach. It should be evident that this state of affairs would likely *not* lead to constructive outcomes for either side.

Figure 5

A Polycentric Image of the Hermeneutic Circle



The latitudinal and longitudinal spheres of the globe correspond to the polycentric (or many-centered) points of intersection connecting the Self with the Other. The synergy of this interactive dynamic fills the relational sphere as illustrated by the background image of the Yin and the Yang. That dynamic is typified by a perpetual cycle of creative destruction, corresponding to the global shift from seasons of creation to seasons of destruction, and the eternal transition from day to night, lightness to darkness.

Unlike the bi-linear, two-dimensional utility frontier graphs used to illustrate alternate outcomes based on strategic choices and/or posited behavioral tendencies for coping with conflict,¹⁶⁷ the Hermeneutic Circle, as illustrated in Figure 5, is a three-dimensional realm in which the negotiation of justice and human needs can be envisioned as a complex, multi-dimensional, and "polycentric" task, to borrow the phrase adopted by Lon Fuller (from Michael Polanyi) in describing courts' roles in managing complex adjudication:

A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all

¹⁶⁷ See *supra* Figures 3 & 4, and text accompanying notes 42–46 & 98–105.

likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the double pull caused one or more of the weaker strands to snap. This is a polycentric situation because it is many centered—each crossing of strands is a distinct center for distributing tensions.¹⁶⁸

The process of self-education and other-knowledge that occurs in the Hermeneutic Circle is also a polycentric task. It should begin by learning to describe the differences or inconsistencies within ourselves and between ourselves and others that arise in different contexts. Part of this process is learning to listen to one's inner voice during thought or when the outer voice has the floor. The presence of an inner voice—a voice with which we usually do not speak—makes the concept of empathizing with others easier to imagine. That is, we can only truly understand ourselves if we learn to empathize with the inner person. The negotiator should not try to suppress the inner person's voice or the inconsistencies that it articulates, but instead, should "flesh out" those inconsistencies, recognizing that the inner voice and its inconsistencies have legitimate lives of their own within each of us. The acoustics of the Hermeneutic Circle are such, metaphorically speaking, that both the inner and outer voices, as well as every other voice of difference, should be audible to the parties. But to be heard, a voice must first speak.

a. Confronting Inner Conflicts

The different sides of our personalities can cause inner conflicts that make us feel uncomfortable about being in our own shoes. If we are not comfortable being in our own shoes, our ability to speak in order to explain ourselves may be handicapped before we encounter the problems of difference in our interaction with the other side. As a result, when we come to interact with our counterparts we may be unable to assert ourselves effectively or focus on the other person enough to hear, let alone empathize with, him. Thus, we may end up giving the message that we are unclear about what we really want and do not understand or care about what the other person wants. The result of either predicament may be that we jeopardize effective communication and forsake possible zones of agreement,

¹⁶⁸ Fuller, *supra* note 48, at 127–28 (citing MICHAEL POLANYI, *THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS* 171 (1951)); *see also* SIMMEL, *supra* note 72 (observing the role of conflict in human relations and the interdependency of individuals with groups, creating a "web" of group affiliations); Chayes, *supra* note 6, at 1310–11; Ulrich, *supra* note 144, at 432–34.

also making it less likely that any agreement we reach will truly satisfy our own interests or be the product of a “meeting of the minds.”

When the individual begins to know and understand internal voices and detect the inconsistencies between the internal and external self, she should then start thinking about how she can work to resolve or manage these inconsistencies. Philosophically, each of us should learn to have a healthy respect for inconsistencies in ourselves—that is, for the “otherness” of our inner person and the ambivalence such inconsistencies create. We should not, therefore, seek to repress those ambivalences. The existence of this otherness and the resulting inconsistencies is inevitable. Think of the psyche as a mountain. Every mountain is multi-dimensional in structure, characteristics, and appearance. As a result, every side of it looks different depending upon where you stand. Our psyches are equally multi-dimensional. It is perfectly healthy and normal to struggle with any or all of these internal inconsistencies. Just as mountain climbers struggle with the natural edifices they seek to “conquer,” through struggles with our own psyches we can learn ways to “climb to the top” of ourselves, to reach “peaks” of self-understanding, and, from those cognizable heights, to see, come to know, and appreciate the full range of our own beings.

When we know and understand ourselves, it is easier to be open about our views and to listen more effectively to the differing views of others. To achieve this level of self-knowledge we must expose our own points of view, interests, and values to close examination and scrutiny. Metaphorically speaking, we must look in the mirror ourselves as well as hold it up to the other side, for, in any given negotiation context, difference can originate from within ourselves as well as from our counterparts.

b. Knowing the Terrain of the Hermeneutic Circle

Equally as important as the process of self-understanding and understanding of others is learning to know the terrain of the Hermeneutic Circle. Every negotiation setting is a unique situation for interaction that can be seen as being both static and dynamic. Due to the changing nature of negotiation interactions, all such contexts are typified by differences between people that are ever-present and ever-changing, depending upon the issues being negotiated, the values, demeanor, and temperament of the parties, and external variables over which the parties may have little or no control.

When we experience intra-personal or inter-personal difference and the conflict it can produce, we often experience feelings of stress to which we can respond in a number of ways. This can lead to anxiety and other psychological responses that may block our intellectual capacities and drain us of resources, making it difficult for us to envision entering into the

Hermeneutic Circle, even resistant to entering into it, let alone to the possibility of resolving conflict through its influence. We may only feel able to respond viscerally to situations and end up manifesting “reactive” forms of behavior. For example, we may falsely blame others, break into an indiscriminate rage or become otherwise violent or unpleasant. We may feel confused and purposeless, or simply freeze and become passive or withdrawn. All of these behavioral dynamics can occur within the realm of the Hermeneutic Circle as part of the normal dynamic of learning to engage in *joining (behavioral) empathy*. However, when they do occur they are more than likely necessary to the breaking through of barriers to empathy.

c. Achieving Joining Empathy

Once joining empathy is achieved, it will foster the development of self-awareness and other-awareness. It will also encourage the building of related communication skills needed to achieve joining empathy as a means of resolving disputes in a manner that will serve justice and human needs. Over two decades of ADR pedagogy in the law school setting suggests that in the face of conflict—that is, in any diadic or multi-party interaction that requires the enlargement and/or slicing of the metaphorical pie—most negotiators resort to a repetitive and limited set of responses that may be classified as either pre-dominantly self-centered, as opposed to other-centered, or the reverse.¹⁶⁹ Negotiators often fail to experience the synergistic dynamic between actions that are self- and other-serving. As a result, many of them are unable to hold within themselves a full understanding of their own and the other side’s perceptions, interests, capabilities, and needs. It follows, then, that many fail to craft outcomes that dovetail differences in valuation, match shared interests, trade-off on competing interests, and exploit economies of scale by using their respective capabilities to engage in combined activities. Rarely do they “work” the problem even further to optimize joint gains through post-agreement review processes.¹⁷⁰ All too often, differences in culture, race, gender, etc., serve as barriers rather than as bridges to effective self-advocacy and the development and expression of empathy for the “other.”

¹⁶⁹ One colleague of mine became a mediator after discovering that his natural inclination in litigation was to “help” the other side in ways that contravened normative adversarial conduct.

¹⁷⁰ See Howard Raiffa, *Post-Settlement Settlements*, 1 NEGOT. J. 9, 9–12 (1985).

i. *Self-Centered Expressiveness*

Self-centered expressiveness is often linked to instances where a person's hopes for gain, ambitions for accomplishment, needs for survival, or other expectations are the subject of discussion. It can take the form of direct communication (forceful or gentle), direct actions (aggressive or non-aggressive), or indirect communication or action (involving persons away from the negotiation table or actions of self-help, such as improving one's best alternative to the agreement being negotiated).¹⁷¹ The functional aims of this form of expressiveness are numerous. One aim could be to remove immediate obstacles to one's own goals, etc., for the purpose of effecting short or long-range adjustive consequences or self-empowerment. A related function could be to unearth and address deeply rooted problems such as social/interpersonal stresses or economic stresses.

In the context of the Thomas-Kilmann Conflict Modes Instrument, behaviors such as competing, accommodating, avoiding, collaborating, and compromising could be measured on a scale of self-centered expressiveness. Depending upon the *context* of the negotiation and the *purpose* of the negotiator, any of these behaviors could be equally effective forms of self-centered expressiveness if their manifestation by the negotiator shaped the negotiation process and/or the attitudes of the "other side" in a manner that was consistent with the negotiator's goals.¹⁷²

ii. *Other-Centered Expressiveness*

Other-centered expressiveness is the dimension of empathy that makes it possible for us to advocate for others. When we express our understanding of others, or our identification with their needs, perspectives, or feelings, our focus is *other-centered*. When we advocate for or negotiate on behalf of others we engage in other-centered expressiveness. Thus, whether they know it or not, lawyers acting as agents for their clients are accustomed to engaging in "other-centeredness," even though many view advocacy as a

¹⁷¹ "BATNA" is an acronym coined by Fisher and Ury to denote a negotiator's "best alternative to a negotiated agreement." As such, it is the "walk-away" point in negotiation. See FISHER & URY, *supra* note 41, at 104. See also WALTON & MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS, *supra* note 35, at 153-54 (suggesting that parties should compare and evaluate alternatives and endeavor to select the "best" alternative" among those available to them).

¹⁷² This is important because it suggests that the success or fitness of negotiators' behavior should not be measured by the behaviors themselves but by their effectiveness in light of the negotiators' purpose. See Menkel-Meadow, *Legal Negotiation*, *supra* note 44, at 922-25.

form of self-centered expressiveness, because their advocacy on behalf of a client involves internalizing the needs of the client in order to act on the client's behalf. Consequently, the ability to engage in successful, self-centered expressiveness as a negotiation agent requires the agent to have reached a certain level of empathy for the person whom she is representing. This ability to advocate on behalf of others or take steps to satisfy the needs of others in general is called other-centered expressiveness.

iii. *The Cycle of Creative Destruction*

Negotiators can enter the Hermeneutic Circle if they have reached the level of psychological awareness needed to understand themselves and to understand others. If they have learned the listening skills needed to hear the other's interests, views, etc., and if they have developed the communication skills—verbal and nonverbal—needed to express themselves, elicit understanding in others, and convey empathy for others, then they are equipped to negotiate outcomes that serve justice and human needs.¹⁷³ However, these skills will always be in flux every time the negotiator enters into the Hermeneutic Circle. This is the case because, notwithstanding the level of a negotiator's self-awareness and awareness of others, at the outset of every new negotiation, once the negotiator begins to experience the cycle of difference that uniquely defines the Hermeneutic Circle associated with the processing of each dispute, she will have a new opportunity to improve her level of cognitive and affective empathy for the other, as well as to broaden her skills repertoires for expressing self-centeredness and other-centeredness—i.e., *behavioral* empathy—no matter how sophisticated her dispute resolution skills may already be. In this process, she may *not* call into play skills that were useful in a prior negotiation if they would not serve the same, constructive function in the present exchange.

This ongoing cycle of creative destruction results in the simultaneous contraction and expansion of a negotiator's skills repertoire in adaptive response to the complex, synergistic, and interdependent dynamic of each

¹⁷³ A number of scholars in the field of psychology have analyzed important aspects of these, often complex, verbal and nonverbal skills in the communication process. See generally Nalini Ambady & Robert Rosenthal, *Thin Slices of Expressive Behavior as Predictors of Interpersonal Consequences: A Meta-Analysis*, 111 PSYCHOL. BULL. 256, 256–74 (1992); Bella M. DePaulo, *Nonverbal Behavior and Self-Presentation*, 111 PSYCHOL. BULL. 203, 203–43 (1992); Linda Tickle-Degnen & Robert Rosenthal, *The Nature of Rapport and its Nonverbal Correlates*, 1 PSYCHOL. INQUIRY 285, 285–93 (1990); Linda Tickle-Degnen et al., *Nonverbal Behavior*, 3 ENCYCLOPEDIA OF HUM. BEHAV. 293, 293–301 (V.S. Ramachandran ed., 1994).

communication that takes place between people within the polycentric web that is the Hermeneutic Circle. Figure 5 illustrates this dynamic by superimposing intersecting latitudinal and longitudinal radials on the globe-like model of the Yin and the Yang. The radials represent each party's potential for "curvilinear" progression in relation to the other through the realms of "joining empathy." This form of progression affords the parties the opportunity to realize outcomes that are the result of greater self-awareness and awareness of the other, and that better serve justice and each party's respective human needs. This is because both levels of heightened awareness, along with each negotiator's expression of this knowledge to the other person, are often central to the crafting of outcomes that are just to each side, that best serve each side's human needs, and that thereby preserve the integrity of the ADR process as an integral part of the contemporary dispute processing continuum.

D. The Prescriptive Logic of the Heuristic Framework

Every "system" of dispute resolution has its own "logic," that is, a "system[] of behavioral norms and beliefs that 'ha[s] [its] own existence, ha[s] [its] own life.'"¹⁷⁴ Even the medieval bloodfeud had its own internal logic, which had the affect of serving the medieval conception of justice and preserving the cooperative "equilibrium" in that historical context where the centralized authority was relatively weak. And contrary to Hobbes' nightmarish rendition of such a state of affairs as being "anarchic," the "system" of blood-feuding had an inherent order-producing effect that endured through the midway point of the medieval period in English legal history, and well into the late medieval period in Icelandic legal history.¹⁷⁵

The prescriptive logic of the proposed heuristic framework is found in the concept of the Hermeneutic Circle. But how, one should ask, can we achieve a greater awareness of self in experiencing otherness in a world that is typified by disparate assumptions about the primacy of self versus other-centeredness, and where the shadow of the Prisoner's Dilemma hangs over the psyche of social intercourse, both in and outside of prison? In a world such as ours, made up of an incalculable mix of "good" and "bad" actors, why should we take the risk of being "good" or "just" or behaving "cooperatively" in relation to the "other," when the "other" may have the opposite intentions? For the moment, this Article suggests the brief answer is

¹⁷⁴ Kilgore, *supra* note 120, at 146 (quoting EMILE DURKHEIM, *MORAL EDUCATION: A STUDY IN THE THEORY AND APPLICATION OF THE SOCIOLOGY OF EDUCATION* 25 (1961)).

¹⁷⁵ See William I. Miller, *Choosing the Avenger: Some Aspects of the Bloodfeud in Medieval Iceland and England*, 1 L. & HIST. REV. 159, 160-75 (1983).

that we should take this risk because we are free to do so.¹⁷⁶ When we realize just how valuable this freedom is, the risk itself becomes enabling, and taking the risk empowers us to create with the “other” our own logic for negotiating justice and human needs. This is the prescriptive logic of the Hermeneutic Circle. It is an enabling, reformatory logic of self-determination, not a harmonizing logic of social domination. It therefore reflects the original aspiration of the founders of the ADR movement. But it is not a self-executing logic. At times it will require no small degree of risk-taking and effort by both practitioners and parties to ADR processes.

In the Texas prisoners’ empathy experiments, inmates’ concerns about differences between the “self” and the “other” served initially to dampen the willingness of the women to risk communicating about “self.” As one of the inmates participating in the experiment explained:

Prison is not like out there. We’re all at our worst in here. Everyone has done something wrong to get here” Tammi said that the assumption of criminality in other inmates requires specific and extreme responses to conflict with another inmate. “I don’t know what you’re in here for or who you really are or how much time you’re doing. So you don’t know who you’re up against. So if someone really jumps on me, if I don’t fold, I’ll try to kill ‘em.” It is taboo to inquire about the crime for which the inmate is incarcerated There is a kind of black hole when it comes to understanding the intentions and feelings of other inmates. There is a preconceived notion that another inmate will try to gain advantage over another by all means possible; in a fight, for example, the other inmate will fight to kill. Inmates reduce risk by reducing interaction with others This offers few opportunities to emotionally connect with other people.¹⁷⁷

Similarly, many actors in the “free world” make such prison-like assumptions about human nature and the “risks” of communication and discourse. Indeed, as we have seen, the research upon which so much behavioral theory about negotiation rests is drawn from this very “Prisoner’s Dilemma” as seen through the lens of game theory. Yet all prisoners in the game theory experience and in real life were free before they became nominal or actual captives. As the Texas prisoner, Tammi, observed of her co-inmates, they got imprisoned in the first place because they “defected” from a specific behavioral norm. The free and the non-free worlds, then, are

¹⁷⁶ See, e.g., Valerie A. Sanchez, *Bad Intentions, Good Outcomes, Who Loses?: How Do We Achieve Freedom From Terror?* (work-in-progress) (on file with the author).

¹⁷⁷ Kilgore, *supra* note 120, at 157–58.

made up of an ever-changing mix of conformists and defectors. Relatively few defectors in the free world get put in prison for defecting because the grasp of the criminal justice system is limited to punishing a relatively small sector of the group of defectors. Similarly, in the non-free world, the most successful defectors—that is, the women who behave in a “masculine” manner by “dominating” others—reap status rewards within the prison’s social hierarchy notwithstanding the risk of punishment in the logic of the panopticon.

Given the logic of defection in the free world, how can individuals negotiate justice, let alone human needs, when they are themselves continually faced with the threat of defectors? Perhaps the experience of the Texas “prison logic” will lend prescriptive guidance that reaches well beyond the scope of the prisoners’ dilemma, both in game theory and in the real world:

In the beginning, . . . [w]hen we asked women to speak . . . their narratives contained no reference to anything that anyone else in the room had previously said. The conversation took on the character of turn-taking in the extreme sense, where a woman would respond to a question posed by a member of the research team and then turn her attention away from others in the group, biding her time until she was called to speak again. We sensed a profound lack of trust among participants that might prevent them from making personal connections with one another. Participants hesitated to offer their personal experiences for fear that the information would be used against them by others [O]ver time, participants . . . began to exhibit more connection to the content of others’ utterances. Participants increasingly shared their life experiences with one another and helped others to make sense of their own life experiences. After 7 months of weekly 2-hour meetings, the nature of the conversation had evolved from extreme turn-taking with little connection among wary participants, to talk that was on-topic yet still involved little helping behavior among participants, to problem-solving conversation in which participants asked questions of one another, offered advice, and exhibited behaviors indicative of empathic joining The result of the Explorations intervention was the development over time of a group logic of empathy that encouraged empathic practices of the more emotionally connected kind: affective empathy and, in particular, empathic joining [T]here was compelling evidence that Explorations had developed a collective cognition about empathy and about the group itself as a social actor. This unique logic of Explorations stood in contrast to prison logic and to the habitus of individual women when they began their membership with the group.¹⁷⁸

¹⁷⁸ *Id.* at 159–60.

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It may indeed be that as negotiators and practitioners of ADR explore new horizons of “self” and “other,” and reach heightened levels of self-awareness and other-awareness, this logic of the Hermeneutic Circle will enable them to transcend the logic of both the Prisoner’s and the Negotiator’s dilemmas.

One can indeed deduce from the analysis of Lax and Sebenius that managing their Negotiator’s Dilemma successfully entails structuring a negotiation over a period of time sufficiently long enough to give the parties the opportunity to be trusting and to test each other’s trustworthiness, and thereby to develop an informed relationship where trust is accorded only after the logic of mutual cooperation has been established. In some cases this will undoubtedly entail a process of breaking through the initial logic of the Prisoner’s Dilemma, which presumes defection. One strategy for doing this may be tit-for-tat. But tit-for-tat may be an unnecessary and undesirable first response to a competitively claiming tactic by the other party. Indeed, the logic of the real life prisoners’ dilemma demonstrates that the punitive nature of prison discipline, where there was an ever-present fear of retributive justice by the central authority—*i.e.*, the officials of the prison system—had a dampening affect on the women’s ability to learn empathy in the prison context. Thus Roger Fisher’s suggestion that tit-for-tat (or presumably any form of “discipline and punishment” in response to competitive defection or bad behavior) confounds the logic of relational cooperation that is essential to the successful working of the principled negotiation approach, may also hold true for the logic of joining empathy.

A recent dispute resolution initiative in the seemingly intractable partisan conflict continuing in the Middle East (where claiming moves by both sides are the only consistent mode of communication) experimented with “alternative” forms of diplomacy, that is, diplomacy by third-party neutrals not associated with any centralized governmental authority. This experiment with “track-two” diplomacy—called the Search for Common Ground in the Middle East—was a “multi-faceted, non-governmental initiative” that endeavored to facilitate “cultural empathy among members of opposed communal groups”—the Arabs and the Israelis.¹⁷⁹ However, in this most difficult of conflict situations, the lessons from the project’s failures, pronounced by the repeated impasses in communication caused by each side’s violent tit-for-tat tactics, were perhaps necessarily more insightful than

¹⁷⁹ Nathan C. Funk, *Theory and Practice of Track-Two Diplomacy: Impact and Dynamics of the Search for Common Ground in the Middle East Initiative*, DISSERTATION ABSTRACTS INTERNATIONAL, SECTION A: HUMANITIES & SOCIAL SCIENCES, vol. 61 (8-A), March 2001, at 3340.

the lessons learned from an early success might have been. In this study, the "limitations of humanizing and empowering impacts" suggested that the track-two diplomacy had failed completely to develop a "realistic cultural empathy among participants from [these] estranged communities."¹⁸⁰ As a result, the perceived differences between the sides that created a sustained Prisoner's Dilemma logic could not be overcome.

Even in complex, polarizing intercultural disputes, such as the Arab-Israeli conflict, the group logic of the Prisoner's Dilemma may ultimately be broken, as it was in the Encounters experiment with the Texas inmates, if members from both groups risk entering into the interactive dynamic of the Hermeneutic Circle, where individual narrative opens the way for mutual understanding, and the synergistic process of merging self with other frees each side from the logic of the "circle of one" that typifies the Prisoner's Dilemma. Recall the profound insight about the importance of cancer victims' narratives to the development of empathy for them by tobacco company lawyers: "if parties do not understand or hear each other, they cannot begin to resolve their perceived differences."¹⁸¹ Allowing the process of storytelling, where the full narrative of personal experience can take place as part of the dispute resolution process, is one of the chief innovations of ADR in our system of justice. It will continue to be of primary importance to preserving the integrity of the dispute processing continuum.¹⁸²

IV. THE FUTURE OF ADR: JUSTICE, HUMAN NEEDS, AND THE DILEMMA OF DIFFERENCE

As processual institutions of legal dispute resolution, both adjudication and ADR can serve justice and human needs. But they can also effect the social domination of the individual if they fail to account for the array of interests and "differences" between people. If addressed in a dispute resolution setting, the inclusion of these interests and differences can result in resolutions to conflict that better serve justice and human needs. If overlooked, outcomes in either fora will be predominantly one-sided.

Mary Parker Follett inveighed against the potential for social domination of the individual in dispute resolution processes that were controlled by courts because they tended to apply rules of law to the disputes in a manner

¹⁸⁰ *Id.*; see also Sanchez, *Bad Intentions, Good Outcomes*, *supra* note 176.

¹⁸¹ Johnston, *supra* note 123, at 3382.

¹⁸² The limited lexicon open to parties in the adjudicatory process has been the subject of insightful commentaries. See, e.g., Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1593-1609 (1987); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2104-06 (1989); see also Sanchez, *Bad Intentions, Good Outcomes*, *supra* note 176.

that produced mechanical compromises and artificial resolutions of conflict.¹⁸³ Laura Nader has warned that the institutionalization of ADR processes has effected the social domination of the individual by the state through a “harmony ideology” that has diverted legal disputes away from courts as a means of dampening conflict and circumventing the principle of equal access to equal justice for all.¹⁸⁴ Trina Grillo and others have observed that ADR processes can be used to facilitate the social domination of weaker parties to disputes by stronger parties on account of differences in race, gender, ethnic and economic background, etc. that affect the power dynamic between the parties.¹⁸⁵ In her insightful critique of Supreme Court decisionmaking, Martha Minow has also made similar observations about the tendency of our system of adversarial justice to perpetuate inequality through its failure to perceive and address the issue of “difference” between people adequately: “[t]he more powerful we are, the less we may be able to see that the world coincides with our view precisely because we shaped it in accordance with those views.”¹⁸⁶

¹⁸³ See *supra* text following note 32.

¹⁸⁴ In Nader’s view, the institutionalization of the ADR movement has resulted in “changes in the handling of civil cases . . . that functioned to suppress the realities of class, gender, and racial antagonisms in the United States, while affording efficiency and often cheaper dispute resolution for business.” Nader, *Controlling Processes in the Practice of Law*, *supra* note 47, at 1, 5; see *supra* notes 107–10 and accompanying text (discussing Nader’s view on the positive role of conflict in social life).

¹⁸⁵ Grillo’s central concern is that participants in mandatory mediation

who operate in the “female mode”—whether biologically male or female—will respond more “selflessly” to demands of mediation. Whether the ethic of care is to be enshrined as a positive virtue, or criticized as a characteristic not belonging to all women and contributing to their oppression, one truth emerges: many women see themselves, and judge their own worth, primarily in terms of relationships. This perspective on themselves has consequences for how they function in mediation.

Grillo, *supra* note 88, at 1602–03 (citations omitted); see *supra* notes 88–93 and accompanying text (discussing Grillo’s concerns about the risks of mandatory mediation for these participants); see also Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 L. & SOC. INQUIRY 145, 151–54 (1988) (suggesting that ADR may expose parties to higher risk of prejudice); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360–61, 1375–91 (suggesting that mediation may allow for the expression of racial and ethnic prejudice).

¹⁸⁶ Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 73 (1987).

A. Resolving the Dilemma of "Difference" Through ADR

How can problems of "difference" be resolved in a system of dispute resolution without perpetuating the problems of social domination that the principle of equal justice for all seeks to remedy in the first place? Martha Minow's descriptive and prescriptive analysis of how justice is, and can be better served in the face of "difference" is equally applicable to judges acting as adjudicators and settlement managers, as it is to practitioners of ADR:

What differences between people should matter, and for what purposes? The endless variety of our individualism means that we suffer different kinds of pain and may well experience pain differently. But when professionals use categories like gender, race, ethnicity, and class to presume real differences in people's pain and entitlement to help, I worry. I worry that unfairness will result under the guise of objectivity and neutrality. I worry that a difference assigned by someone with power over a more vulnerable person will become endowed with an apparent reality, despite powerful competing views. If no one can really know another's pain, who shall decide how to treat pain, and along what calculus? These are questions of justice, not science. These are questions of complexity, not justifications for passivity, because failing to notice another's pain is an act with significance.¹⁸⁷

In Minow's view, the extent to which courts and rules of law as institutions of justice can adequately address questions of difference presents a central dilemma: "we may recreate difference either by noticing it or by ignoring it."¹⁸⁸ Like the Prisoner's and the Negotiator's dilemmas, the dilemma of difference appears unresolvable. However, in Minow's view, it need not be:

The dilemma of difference appears unresolvable. The risk of non-neutrality—the risk of discrimination—accompanies efforts both to ignore and to recognize difference in equal treatment and special treatment; in color- or gender-blindness and in affirmative action; in governmental neutrality and in governmental preferences; and in decisionmakers' discretion and in formal constraints on discretion. Yet the dilemma is not as intractable as it seems. What makes it seem so difficult are unstated assumptions about the nature of difference. Once articulated and examined,

¹⁸⁷ *Id.* at 11 (citing MARTIN S. PERNICK, *A CALCULUS OF SUFFERING: PAIN, PROFESSIONALISM, AND ANESTHESIA IN NINETEENTH-CENTURY AMERICA* 239 (1985)).

¹⁸⁸ *Id.* at 12. Minow explores "three versions of the dilemma of difference, illustrating how they arose in the contexts of religion, ethnicity, race, gender, and handicapping conditions in cases before the Supreme Court during the 1986 Term." *Id.* at 15.

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these assumptions can take their proper place among other choices about how to treat difference.¹⁸⁹

The difficult task of moving beyond “constricting assumptions” requires, in Minow’s view, “[e]fforts to adopt or imagine alternate perspectives[.]”¹⁹⁰ While doing so completely may be “ultimately impossible,” the effort alone “may help us recognize that our perspective is partial and that the status quo is not inevitable or ideal.”¹⁹¹ In the final analysis, argues Minow, “[i]f we want to preserve justice, we need to develop a practice for more knowing judgments about problems of difference. We must stop seeking to get close to the ‘truth’ and instead seek to get close to other people’s truths. The question is, how do we do this?”¹⁹² Minow prescriptively calls for

settings in which to engage in the clash of realities that breaks us out of settled and complacent meanings and creates opportunities for insight and growth. . . . Justice depends on the possibility of conflicts among the values and perspectives that justice pursues Justice can be engendered when we overcome our pretended indifference to difference and instead people our world with individuals who surprise one another about difference Courts, and especially the Supreme Court, provide a place for the contest over realities that govern us This is the special burden and opportunity for the Court: to enact and preside over the dialogue through which we remake the normative endowment that shapes current understandings. When the Court performs these roles, it engenders justice.¹⁹³

The present Article suggests that when ADR processes perform these functions, they can also engender justice. To this end, the heuristic framework of the Hermeneutic Circle is the metaphorical setting in which each dispute resolver—whether judge or ADR practitioner—can work in concert with the parties to define and serve both justice and human needs. In this setting it is the development of empathy, including the types of empathy

¹⁸⁹ *Id.* at 31.

¹⁹⁰ *Id.* at 58.

¹⁹¹ *Id.* at 60.

¹⁹² *Id.* at 74.

¹⁹³ *Id.* at 74, 95 (citing MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 81 (1986) (“[J]ustice really *is* strife: that is, that the tensions that permit this sort of strife to arise are also, at the same time, partly constitutive of the values themselves. Without the possibility of strife it would all fall apart, be itself no longer.”)).

called for by Minow, that would enable judges, practitioners of ADR, and the parties themselves to break through barriers of difference and resolve the conflict difference creates by engaging in dialogues about difference *and* sameness, and thereby reaching joining empathy.

In the Hermeneutic Circle, one may progress from taking the perspective of the other to actually feeling and expressing his pain—joining empathy. This result is of utmost significance for the future of ADR (and our system of justice as a whole) because it promises to foster justice in a manner that resolves the Prisoner's Dilemma, the Negotiator's Dilemma, and also the dilemma of "difference." Therefore, in the Hermeneutic Circle, as well as in the courthouse, Minow's prescription for how "justice" can be "engendered" is equally applicable:

Once you . . . try to break out of unstated assumptions and take the perspective of the person you have called "different" . . . you may glimpse that your patterns for organizing the world are both arbitrary and foreclose their own reconsideration. You may find that the categories you take for granted do not well serve features you had not focused upon in the past. You may see an injury that you had not noticed, or take more seriously a harm that you had otherwise discounted.[] If you try to take the view of the other person, you will find that the "difference" you notice is part of the relationship or comparison you draw between that person and someone else, with reference to a norm, and you will then get the chance to examine the reference point you usually take for granted. Maybe you will conclude that the reference point itself should change. Employers do not have to treat pregnancy and parenthood as a disability, but instead as a part of the lives of valued workers. You may find that you had so much ignored the point of view of others that you did not realize that you were mistaking your point of view for reality. Perhaps you will find that the way things are is not the only way things could be—that changing the way you classify, evaluate, reward, and punish may make the differences you had noticed less significant, or even irrelevant, to the way you run your life.¹⁹⁴

The prescriptive features of the heuristic framework proposed in the present Article target the problem of social domination in ADR processes by endeavoring to empower parties and practitioners through education about the self and the other and the complexities of the interactive dynamic that can occur between them. In the Hermeneutic circle, judges and practitioners of ADR, as well as parties in both fora, can reach beyond the imperfection of

¹⁹⁴ *Id.* at 72, citing GEORGE ELIOT, DANIEL DERONDA 155 (Graham Handley ed., 1984) ("[F]or he was feeling the injury done him as a maimed boy feels the crushed limb which for others is merely reckoned in an average of accidents."); see POSNER, FRONTIERS OF LEGAL THEORY, *supra* note 150, at 243 (commenting on the importance of empathy in judges).

artificial reason and learn to deal more directly and creatively with the real problems of real people and the real differences that seem to separate them in their moments of conflict. It may also be important that parties and practitioners have access to full information about their legal rights, the remedies associated with them, and the comparative risks and benefits of seeking judicial and alternative resolution of their disputes.¹⁹⁵

B. *Serving Justice Through ADR*

The task of serving justice through adjudication will never be perfectly achieved, no matter how many rules of procedure or substantive law are created to further this goal. It is perhaps for this reason that the process of administering justice in court increasingly involves a bargaining process where the interests of the parties, and of society at large, are in some measure, negotiated on an ongoing, case by case basis. As Abram Chayes observed in his study of legal decisionmaking in public law litigation:

the decree is to be quasi-negotiated and party participation is to be relied upon to ensure its viability, representation at the bargaining table assumes very great importance, not only from the point of view of the affected interests but from that of the system itself . . . [T]he tendency, supported by both the language and the rationale of the Federal Rules of Civil Procedure, is to regard anyone whose interests may be significantly affected by the litigation to be presumptively entitled to participate in the suit on demand. In a public law system, persons are usually "affected" by litigation in terms of an "interest" that they share with many others similarly situated,

¹⁹⁵ See generally NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM *passim* (Laura Nader ed., 1980) (a collection of essays examining various alternative to the American legal system); Grillo, *supra* note 88, at 1597–1600 (critical analysis of mandatory mediation processes); Delgado et al., *supra* note 185, at 1402–04 (concerning the heightened risk of racial and ethnic prejudice in ADR processes). For analysis of the role and nature of mediation in the modern ADR movement, see generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 15–27 (1994); Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 253 (1989). For a rich critical analysis of approaches to mediation, see also James J. Alfani, *Trashing, Bashing, and Hashing it Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66–73 (1991) (examining the practice of court-annexed mediation in Florida); Valerie A. Sanchez, *Coaching Self-Help: How to Conflict Constructively in a Complex World of Mixed Ideologies* (work-in-progress) (on file with the author); Valerie A. Sanchez, *Storytelling and Nursery Rhymes: Holding Up the Mirror to the Wolf and Little Red Ridinghood* (work-in-progress) (on file with the author).

whether organized or unorganized Participation of those affected by the decision has a reassuringly democratic ring, but when participation is mediated by group representatives, often self-appointed, it gives a certain pause What about those who do not volunteer—most often the weak, the poor, the unorganized? The judge can . . . appoint guardians *ad litem* for unrepresented interests . . . [a]nd . . . employ experts and amici to inform himself on aspects of the case not adequately developed by the parties. Finally, the judge can elicit the views of public officials at all levels These observations will, no doubt, fail to dispel the uneasiness that American political and legal thinkers have always felt at the power of courts to frustrate, or to order, action by elected officials. For it cannot be denied that public law litigation explicitly rejects many of the constraints of judicial method and procedure in which we have characteristically sought respite from the unease.¹⁹⁶

The restraints traditionally associated with judicial method, and traditionally viewed as lacking from ADR, are at the core of many critic's concerns that justice cannot be (or should not be) negotiated through ADR. Early critics of the ADR movement were most concerned with what the system of "traditional justice" might lose if legal disputes were resolved through ADR, rather than through precedent-accreting court judgments.¹⁹⁷ In what has been described as "an optimistic (and perhaps prototypically American) conception of the political role and importance of courts[.]" Owen Fiss, of Yale Law School, "argued forcefully 'against settlement' not only on the grounds that negotiation and mediation tend to [favor] the powerful, but also because the development of alternatives would undermine the creative

¹⁹⁶ Chayes, *supra* note 6, at 1310–12, 1315.

¹⁹⁷ The classic trilogy in this debate was published by Yale Law Journal in 1984–85. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073–76 (1984) (questioning then-Harvard University President Derek Bok's call for revision of the law school curriculum to include "the gentler arts of reconciliation and accommodation," and suggesting that the traditional "tilt in the law school curriculum toward preparing students for legal combat" is more compatible with the institutional role of adjudication as a process for establishing important principles of law and equalizing the field of legal combat between parties with disparate power bases); Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1671 (1985) (arguing that it is "fundamentally misguided . . . to model law and the legal system of modern America" on the norms of the ancient Hebrew and Christian communities); Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665–66 (1985) (arguing that the Judeo-Christian and Islamic underpinnings of our "religious culture contain[] both a theoretical basis for [ADR] and a way to apply theory to disputes"); see also Edwards, *supra* note 5, at 668; see generally Richard L. Abel, *The Contradictions of Informal Justice*, in THE POLITICS OF INFORMAL JUSTICE, *supra* note 108, at 267, 267–96.

role of the courts in developing public policy and inventing new solutions.”¹⁹⁸

Critics of Fiss’s perspective have pointed out that his assumption that court judgments are more just or innovative than outcomes reached through ADR processes is not susceptible to empirical proof.¹⁹⁹ A related point is that the very conception of “justice” necessary to evaluate the “justness” of outcomes is value-laden, and thus subjective and also policy-driven. As a result, “justice” should in some measure be susceptible to negotiation, to the extent that ADR allows, leaving the parties themselves free to set their own standards of justice, if they want to, and therefore free to reach outcomes that may be uniquely “just” to them, under the circumstances.

Fiss’s second major concern about ADR—that the settlement of lawsuits will undermine the precedent-creating function of the common law and the role of judicial policymaking and innovation—is also in need of contextualization. That is, it must be viewed in perspective, in light of the comparative law creating functions of the various branches of government, not just courts. In the legislative realms of government and in the executive branches, governmental entities engage in what is considered to be “pure lawmaking” because they create new rules to be applied by courts to disputes. By comparison, the law creation function of the courts is not one of “pure lawmaking.” As Judge Richard Posner has observed, “[a]lthough many courts engage only in dispute resolution, none engage only in law creation.” This, he explains,

follows from the definition of a court as an agency engaged in applying law to resolve disputes. Pure law creation—the creation of law apart from any concrete dispute—is the domain of constitutional conventions, legislatures, and administrative agencies authorized to make rules in legislative fashion. Courts can create law only as an incident to resolving disputes.

Thus, Posner concludes, courts have only an “incidental function in creating law.”²⁰⁰ Furthermore, a recent effort at “judicial reform” is eroding the extent to which legal opinions actually create precedent. Ironically, due to the burgeoning caseload in federal courts, which was one of the motivations underlying Chief Justice Burger’s call for the institutionalization of ADR within the court system, federal courts have developed the “unpublished

¹⁹⁸ Twining, *supra* note 15, at 381.

¹⁹⁹ Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 434 (1986).

²⁰⁰ POSNER, THE FEDERAL COURTS: CRISIS AND REFORM, *supra* note 8, at 4.

opinion practice" to reduce their judicial "decision writing" workload.²⁰¹ This practice effectively strips this strata of judicial opinions of their precedential function, placing them on the same footing as settlement outcomes—that is, both judicially approved settlement agreements and unpublished opinions are written outcomes of the judicial dispute resolution process that produce no precedential effect. Thus, the limited law creation function of courts may arguably be no more undermined by the advent of "settlement outcomes" than it is by the advent of the "unpublished opinion practice."

Notwithstanding these reasoned responses to Fiss's valid concerns about the institutionalization of ADR, Fiss's worry that ADR may compromise the quality of civic justice in America has been echoed in the halls of the judiciary. One adherent of Fiss's critique of ADR who may be in a better position than Fiss to assess, on a daily basis, the comparative quality of adjudicated versus negotiated justice, is Judge Harry T. Edwards, who serves on the U.S. Court of Appeals for the D.C. Circuit. Edwards has seconded Fiss's suggestion that ADR should *not* be used to resolve lawsuits involving "significant public rights and duties."²⁰² "In other words," writes Edwards, "we must determine whether ADR will result in the abandonment of our constitutional system in which the 'rule of law' is created and principally enforced by legitimate branches of government and whether rights and duties will be delimited by those the law seeks to regulate."²⁰³

Edwards' "civil justice-seeking" perspective continues to be a powerful one, concerned as it is that the quality of justice (and the effectiveness of public law enforcement) can be compromised through resort to ADR instead of adjudication:

The concern here is that ADR will replace the rule of law with nonlegal values For example, many environmental disputes are now settled by negotiation and mediation instead of adjudication. Indeed, as my colleague Judge Wald recently observed, there is little hope that Superfund legislation can solve our nation's toxic waste problem unless the vast bulk of toxic waste disputes are resolved through negotiation, rather than litigation. Yet, as necessary as environmental negotiation may be, it is still troubling. When Congress or a governmental agency has enacted strict environmental protection standards, negotiations that compromise these strict standards with weaker standards result in the application of values that are simply

²⁰¹ See *id.* at 120–29; see generally PAUL D. CARRINGTON, ET AL., JUSTICE ON APPEAL 35–39 (1976); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, *passim* (1981).

²⁰² Edwards, *supra* note 5, at 671.

²⁰³ *Id.*

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inconsistent with the rule of law. Furthermore, environmental mediation and negotiation present the danger that environmental standards will be set by private groups without the democratic checks of governmental institutions.²⁰⁴

The salient elements of these legitimate critiques of ADR may be important items for creative reforms of ADR “from above”—*i.e.*, through new legal rules relating to the use of ADR. With regard to regulatory laws, such as those governing the enforcement of federal environmental legislation or the Americans with Disability Act, for example, it may be beneficial to place rule-based constraints on the types of negotiated outcomes that are acceptable from a standpoint of rule-based principles of justice, thus regulating the alteration, through ADR, of legal standards as a tradeoff for law enforcement gains (a process analogous to plea bargaining). Furthermore, following the example of judicial review of arbitrated outcomes in the field of private sector labor relations, it may be desirable to allow for judicial review of a broader range of outcomes reached through ADR than presently occurs.²⁰⁵ Finally, building on historical precedent dating back to medieval England, it may be advisable, from a standpoint of party accountability alone, to establish a uniform procedure and system for recording settlement outcomes, whether or not they are incident to litigation.²⁰⁶

²⁰⁴ *Id.* at 677.

²⁰⁵ The Supreme Court has ruled that outcomes reached through grievance arbitration in private sector collective bargaining agreements, under the NLRA, are open to some measure of judicial review. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957); see also *supra* notes 24–26. Some settlement outcomes outside the context of labor relations are also subject to the “protective function” of judicial review. See FED. R. CIV. P. 23(e) (requiring court approval for dismissal or settlement of class action cases); ME. REV. STAT. ANN. tit. 19A, §1804 (2003) (requiring judicial review of mediated agreements in domestic relations cases); MINN. STAT. ANN. § 572.36 (2002) (allowing agreement to be set aside when the mediator failed to give the parties certain warnings or displayed “partiality, corruption, or misconduct” that prejudiced a party).

²⁰⁶ The requirement of such a public filing would be analogous to a similar revision of settlement practice during the Angevin period of English legal history (A.D. 1154–1485). During the end of the Anglo-Saxon period of English law, the common settlement document was the “final concord.” It represented the agreement by which lawsuits were settled through written, negotiated outcomes. Usually three copies of the settlement agreement were recorded, one was deposited with the local clergy (whose secular function during this era was to ensure compliance with legal process). See Sanchez, *Towards a History of ADR*, *supra* note 1, at 32. After the Norman Conquest, the role of

the final concord evolved into an instrument for recording ownership of land. Parties to a land transaction would file a fictitious lawsuit about the title to the land being conveyed and would "settle" the rights of ownership in the "purchaser." This was accomplished via final concord, which amounted to recordation of land title. Eventually, the English king, wishing to limit access to his courts to only bona fide disputes, abolished the final concord, effectively prohibiting settlement outcomes. For some time thereafter, the king required any party to a lawsuit to follow through with the suit to the point of final judgment. *See id.* at 32 n.98 (citing DORIS M. STENTON, *ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER* 51 (1965), and Frank M. Stenton, *Acta Episcoporum*, in *PREPARATORY TO ANGLO-SAXON ENGLAND BEING THE COLLECTED PAPERS OF FRANK MERRY STENTON* 175 (Doris M. Stenton ed., 1970)).

The corruption of the legal process by claims and settlements whose goal is unrelated to the pursuit of justice may be a recurring theme in Anglo-American legal systems. However, frivolous filing of lawsuits may be discouraged if state and federal rules of civil procedure are amended to require that settlement outcomes, no matter when they occur during the life of a lawsuit, be placed in the public record. The filing of settlement plans is now an experimental requirement in one Michigan trial court. *See* Daniel R. Deja, *The Required Submission of an ADR Joint Settlement Plan in Civil Cases in the Berrien County, Michigan Trial Court: an Evaluation of its Impact on Case Disposition Time*, 15 OHIO ST. J. ON DISP. RESOL. 173, 173-74 (1999); *see also* John G. Heyburn II, *Current Development in Court Rules and Alternative Dispute Resolution*, 11 LAB. & EMP. L. INST. 81, 82-84 (1999); Richard C. Reuben, *Reforming ADR*, CAL. L., Feb. 1998, at 31, 32-33.

There are, of course, pros and cons to such a requirement. One pro is that a recordation requirement might evolve to give settlement agreements some "quasi-precedential" function. This value would be augmented by a requirement that judges review and approve all settlement outcomes with an eye toward protecting the enforcement of minimal standards of fairness in both public and private law contexts. This would give settlement outcomes the quasi-judicial flavor they had during the Anglo-Saxon period of English legal history, and may address the critiques that Owen Fiss, Harry Edwards, and others have made of ADR. Compare this suggestion with the phenomenon of the "unpublished opinion" discussed *supra*, text accompanying note 201. The risk here is that one element of the "informality" of ADR, an underlying feature of the original impetus for the movement, would be lost. Indeed, it is well established in legal history that once innovations become accepted and incorporated into a reformed status quo, they lose their reformative freshness and effectiveness. This is certainly descriptive of the English courts of equity in the nineteenth century. *See supra* note 11; *infra* note 222. The goal of this suggested reform is to retain the essential features of negotiation, mediation, etc., as "alternatives" to adjudication, but to systematize aspects of the settlement process to accommodate countervailing, justice-seeking concerns.

At the very least, an ADR reform requirement that all settlement outcomes reached in the context of a lawsuit be recorded as a matter of public record will provide analysts with a body of data about the comparative justice of negotiated outcomes versus adjudicated outcomes, and also provide the basis for testing the proposition that justice, to the extent which it can be empirically measured, can be consistently negotiated. As the writings of Jethro Lieberman and other long-standing commentators on the ADR movement reveal, academicians consider the following question to be one of the most important but difficult to answer for lack of empirical data: "Does ADR reach a just

C. *Serving Human Needs Through ADR*

In many ways, human needs are served when justice is served. As Abram Chayes' opined in his examination of public justice, published at the time of the Pound Conference of 1976:

[I]n our contemporary regulatory state...[we must] confront more explicitly the qualities of wisdom, viability, responsiveness to human needs—the justice—of judicial decisions. If we must accept that the artificial reason of the law gives no very certain guidance in these matters, we will be no worse off than other professions—and their professors.²⁰⁷

Given the limitations of artificial reason, it becomes necessary in the search for outcomes that are just *because* they serve human needs to understand the needs of the human beings involved in individual disputes. This requires initial (and often repeated) attempts at perspective taking by judges, practitioners of ADR, and the parties themselves before they can advance through the more complicated realms of the Hermeneutic Circle.

A central dispute-resolving function of ADR, viewed through the traditional lens of the court system, is to “reality test” the parties’ perceptions of the strengths and weaknesses of their respective legal cases. This process now routinely occurs with the aid of judges who “change hats” during the course of a lawsuit and become “settlement managers,”²⁰⁸ facilitating settlement outcomes by the parties who are advised in settlement conferences to “bargain in the shadow of the law” or in the “clear light of legal certainty,” depending upon whether the judge has given the parties a general or specific indication of what his or her ruling will be.²⁰⁹ This quasi-formalized reality-

result or merely an expedient one? How can one measure the justice of a private settlement? The question is important, but it has not been well discussed in the ADR literature—no doubt because it is so difficult a proposition to test.” Liebermann & Henry, *supra* note 199, at 434; *see also* Galanter & Cahill, *supra* note 14, at 1339.

²⁰⁷ Chayes, *supra* note 6, at 1316.

²⁰⁸ *See id.* at 1285; POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM*, *supra* note 8, at 237–41; POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM*, *supra* note 8, at 9–11; *see generally* Menkel-Meadow, *For and Against Settlement*, *supra* note 8, at 42; Resnick, *supra* note 8, at 376. However, it has a long history in Anglo-American law. *See* Sanchez, *Towards a History of ADR*, *supra* note 1, at 26–30, 38 (noting that Anglo-Saxon judges during the early medieval period in English legal history frequently changed hats to facilitated the settlement of lawsuits via negotiated outcomes).

²⁰⁹ Compare Mnookin & Kornhauser, *supra* note 77, at 950, 959–77 (concerning the phenomenon of “bargaining in the shadow of the law”), with Sanchez, *Towards a History*

testing process also occurs through use of hybrid ADR mechanisms, such as the “mini-trial,” which gives parties the opportunity to argue their cases before a neutral third party other than the judge (usually an expert in the relevant areas of substantive law or a retired judge) and, sometimes, a mock jury to get the benefit of those persons’ perspectives of how a judge and/or jury would view the relative merits of each side’s case in a real trial.²¹⁰

The reality-testing function of such court-related ADR processes is, in Judge Edwards’s experience, a productive function, from the standpoint of enlightening parties and saving court resources, because it serves to persuade parties to “compromise” and reach settlement outcomes, rather than risking the consequences of winner-take-all court decisions.²¹¹ Compromise, in Edwards’ view, is the tool proffered by ADR to break deadlock and wrench concessions from each side until they both reach some mutually acceptable point between the two extremes.²¹² This mid-way point is often the point of

of ADR, *supra* note 1, at 26–30 (discussing the analogous Anglo-Saxon phenomenon of “bargaining in the clear light of legal certainty”).

²¹⁰ See Edwards, *supra* note 5, at 673–74 (discussing merits of the mini-trial in aiding parties to settle complex commercial cases). Professor Eric Green is credited with devising the concept of the mini-trial. See Eric Green, *Recent Developments in Alternative Forms of Dispute Resolutions*, 100 F.R.D. 512, 514–16 (1983) (discussing use, after three years of litigation, of nonbonding arbitration procedure before both parties’ corporate executives and a former judge that worked to settle a patent infringement case in thirty minutes). Judge Thomas Lambros is credited with introducing the “summary jury trial” based on the mini-trial model. See Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 468 (1984). For a general discussion of the mini-trial, see GOLDBERG ET AL., *supra* note 7, at 281–83.

²¹¹ As Judge Edwards has opined,

[m]any lawyers insist that a neutral, penetrating, and analytical assessment of a case greatly enhances the prospects of a successful negotiation by offering a realistic view of what could transpire if a case goes to full-blown adjudication. Furthermore, because too many lawyers view the suggestion of compromise as an admission of weakness, mechanisms that place the onus of suggesting settlement negotiations on neither party have tremendous potential for initiating settlement at much earlier stages in the litigation.

Indeed, many private litigants and courts already use ADR because it offers such a neutral assessment and requires parties to think about compromise at earlier stages in the litigation.

Edwards, *supra* note 5, at 673.

²¹² Judge Edwards’s assessment of the importance of neutral evaluation to the willingness of parties to settle through compromise, *see id.*, is informed by the traditional model of adversarial adjudication as a winner-take-all, zero-sum game: each side is seen as fighting to be the “winner,” believing that the only alternative is to be the “loser.” So, by inference, any settlement outcome would have to represent something less than a total

“mechanical compromise,” in the proverbial sense of “splitting the difference” that separates both sides.

While many judges and practitioners of ADR view reaching such “mechanical compromises” as the goal of ADR processes, and many hail ADR for its promise of fostering such “efficient” compromise outcomes, the impulse toward compromise need not be informed by the mechanical urge to resolve disputes by simply “splitting the difference” or finding the parties’ lowest common denominator. Such an “ethic” of “mechanical compromise” may set the standard too low in many cases for outcomes reached through ADR from the standpoint of serving justice and the human needs at stake. By comparison, a more vigorous ethic of compromise—an ethic of “creative compromise”—would be preferable. When looking at the settlement process through the lens of creative, rather than mechanical, compromise, judges, settlement managers, and other practitioners of ADR may be able to help the parties see the broader possibilities available to them through settlement that may bring into play more variables than the set of rights and resources originally at issue in the lawsuit.²¹³ It may also help parties to view and value those resources and each other differently than they did initially. Roscoe Pound himself prescribed such a vigorous, expansive view of compromise in the administration of justice:

victory for one party and something more than a total loss for the other. Nevertheless, because the distribution of rights and related resources in the settlement process is still framed by the adversarial ethic, Edwards views the element of “compromise” as the guiding principle for breaking down each side’s winner-take-all expectations and for moving both parties away from the extremes of their adversarial position-taking. *See id.* In addition to the distribution of resources or “value” available in the “zone of possible agreement,” “gains” are theoretically available by virtue of the parties saving, through settlement, the transaction costs they would have incurred if they went to trial. *See* Gilson & Mnookin, *supra* note 38, at 542 (discussing creation of value through reduction of transaction costs in divorce settlements); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 219, 226–27 (1993) (suggesting that the interest of lawyers in garnering substantial legal fees from litigation often conflicts with the interest of parties in saving these “transaction costs” through settlement and becomes a barrier to settlement); *see also infra* notes 217–18 (discussing the economic meaning of “value,” “evaluation,” “exchange,” and “value creation”).

²¹³ The creativity needed to broaden the playing field, so to speak, cannot be underestimated. The process of creative compromise is an active one that may depend upon reaching into the psyches, not just the pocketbooks, of the parties involved if opportunities for synergistic creativity are to be tapped. This process is the subject of an extensive work in progress. *See generally* VALERIE A. SANCHEZ, *NEGOTIATING THE 21ST CENTURY*, *supra* note 34.

The task is one of satisfying human demands, of securing interests or satisfying claims or demands with the least friction and the least of waste, whereby the means of satisfaction may be made to go as far as possible. [W]e get no peace, as it were, until we secure as much as we can and the pressure of the unsecured interest or unsatisfied demand keeps us at work trying to find the more inclusive solution.²¹⁴

Pound's vision for rigorously crafted compromises was carried forward by Mary Parker Follett who also spoke out against winner-take-all judicial outcomes and their half-siblings, mechanical compromise settlements. Her critique of mechanical compromise was also rooted in a conception of justice that did *not* view rules of law as the axis on which justice must *necessarily* hinge because rule-based conceptions of justice artificially packaged social reality into discrete legal classifications for purposes of impersonal, abstract (but often policy-determined) decisionmaking by judges. Follett therefore shunned the suggestion that the system of justice could not be improved by alternative, integrative approaches to the resolution of legal disputes that better served human needs:

Brilliant empiricists have poked much pleasant fun at those who tell us of some value that should-be instead of what is. We want something more than either of these; we want to find out what may be, the possibilities now open to us. This we can discover only by experiment We want to know how [people] can interact and coact better: 1) to secure their ends; [and] 2) to understand and so broaden their ends.²¹⁵

In theory, Follett's views were akin to those of Ayn Rand. Both women believed in the supreme role of the individual to fuel capitalist markets through the exercise of creative freedom and self-determination.²¹⁶ The

²¹⁴ POUND, *INTERPRETATIONS OF LEGAL HISTORY*, *supra* note 9, at 157–58; *see also* Minow, *supra* note 186, at 95 (quoted in *supra* text accompanying note 193) (calling for courts to engage in vigorous explorations of difference so that they can “engender” justice as they administer it).

²¹⁵ MARY PARKER FOLLETT, *CREATIVE EXPERIENCE* xi–xii (1924). Decades later Professor Abram Chayes made a similar observation about the tendency of judges in private law litigation to be influenced by policy considerations. *See* Chayes, *supra* note 6, at 1307–08 (commenting on the potential effect of policy considerations by judges presiding over complex public law litigation).

²¹⁶ *See generally* AYN RAND, *CAPITALISM: THE UNKNOWN IDEAL* 24 (Signet ed., The New American Library, Inc. 1967):

The Free Market represents the *social* application of an objective theory of values. Since values are to be discovered by man's mind, men must be free to discover them—the think, to study, to translate their knowledge into physical form, to offer their products for trade, to judge them, and to choose, be it material goods or

individual was also the moving force in the "New State" Follett envisioned, where difference—broadly defined—would be seen as a source of "value."²¹⁷ When contentions seemed irresolvable, Follett saw the web of

ideas, a loaf of bread or a philosophical treatise . . . every man must judge for himself, in the context of his own knowledge, goals and interests.

Id.; AYN RAND, *THE FOUNTAINHEAD* 24 (Signet ed., The New American Library, Inc. 1968) (1943) ("The Parthenon did not serve the same purpose as its wooden ancestor. An airline terminal does not serve the same purpose as the Parthenon. Every form has its own meaning. Every man creates his meaning and form and goal."); *see also* ADAM SMITH, *THE WEALTH OF NATIONS* (P.F. Collier & Sons 1905) (1776):

It can never be in the interest of the proprietors and cultivators to restrain or discourage in any respect the industry of merchants, artificers, and manufacturers. The greater the liberty which this unproductive class [merchants, artificers, and manufacturers] enjoys, the greater will be the competition in all the different trades which compose it, and the cheaper will the other two classes [proprietors and cultivators] be supplied, both with foreign goods and with the manufactured produce of their own country.

Id. at 17.

²¹⁷ For Follett, "individuality" consists "neither of the separateness of one individual from the other, nor the differences of one man from the other It is difference springing into view as relating itself to other differences. The act of relating is the creating act." MARY PARKER FOLLETT, *THE NEW STATE* 63 (1923). The act of "relating" to others' "differences" ultimately involves creating "value," in terms consistent with the economist's definition of "value" (the objective measure of an object to society), and also involves the concept of "evaluation," which concerns relating the differing subjective value each individual might attach to such objects. These concepts are well defined by Professor Frederick S. Deibler, a contemporary of Follett's who taught economics at Northwestern University:

Before goods can be exchanged some basis must be found for comparing them. How can a grocer and a shoe dealer trade their wares without each having some knowledge concerning the goods to be traded and some basis for measuring a unit of one in terms of a unit of the other? Of course it is possible to measure goods by some concrete unit as the pound, or yard, or bushel, etc., but such units do not express the social significance of the goods measured. A yard of silk may have much greater social significance than a bushel of oats, but, before trading can take place, a method of comparing the relative significance of goods to be exchanged must be found. The consideration of this problem brings us to the subject of value which is recognized in all modern treatises as the basis of measuring the social significance of goods and of establishing a method of exchanging them. As used in economics, value means the power which one good has to command other goods in exchange, or briefly stated, value is power in exchange . . .

From this definition it will appear that value is a market phenomenon which arises only when goods are being exchanged. In this sense, then, value must be regarded as an objective fact. However, value should be distinguished from the process of evaluation which is a subjective act. Prior to actual exchange, the

social and economic intercourse as interjecting a resolute sense of the possibilities of discourse leading to value exchange and value creation,²¹⁸ enabling the parties to build business empires from the embers of prior conflict.²¹⁹ Follett's was a "fighting view" of conflict, not a harmonizing view. She, like George Simmel before her and Laura Nader, Martha Minow, and others after her, saw conflict, like the grain of sand in the oyster which eventually produces the pearl, as the necessary catalyst to what she called, "creative experience" and "social progress." It was the individual alone, in Follett's view, who was in the best position to resolve his own disputes through self-help in the form of integrative bargaining, rather than through resort to judicially fostered, mechanical and rule-centered outcomes.²²⁰ But Follett's view of the individual was not as a "circle of one." Her theory of integrative bargaining was not, therefore, confounded by the logic of the Prisoner's, or the tension of the Negotiator's, Dilemma. Nor was it limited by the seeming dilemma of difference. Follett's idea of creative compromise depended for its realization upon the parties' recognition of their differences and their mutual interdependence, and upon their willingness to enter into the

prospective purchaser is confronted with a number of courses of conduct. He may be presented with an opportunity to buy real estate and the chance to establish a home; he may have a security, such as a stock or a bond of some industrial enterprise offered him as a means of making provision for the future needs of himself and his family; he may be sought by auto salesmen, each expounding the relative merits of the car that he is selling, and with a gentle suggestion that man lives but once and why not enjoy the comforts of life as he goes along? Or, it may be, he is contemplating a trip abroad, or the purchase of books, fine pictures, statues, or some other method of contributing to his intellectual satisfaction and growth. These are a few of the great variety of alternatives that are constantly besieging the individual and calling for a decision on his part. But before a trade can be effected there must be some weighing of these various alternatives.

FREDERICK S. DEIBLER, *PRINCIPLES OF ECONOMICS* 175-76 (1929). Consistent with Professor Deibler's view of the importance of the subjective element of "evaluation" to individuals decisions about "exchange," Thomas Hobbes vision of human nature suggested that "the appetite of every person determines the appropriate terms of exchange." Epstein, *supra* note 73, at 1365.

²¹⁸ The concept of "value creation" refers to Follett's notion that discourse about each parties' differing subjective evaluations of the original range of resources available for exchange between them can work to increase the share of those resources that each side can take with less or no cost to the other side. *See supra* note 41. For a discussion of the importance of differing subjective evaluations to the phenomenon of "value creation," see Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L. J. 369, 374-87 (1996).

²¹⁹ *See generally* Sander & Rubin, *supra* note 2, at 209-10 (discussing the inter-relationship between dispute resolution and deal-making in the negotiation process).

²²⁰ *See* DYNAMIC ADMINISTRATION, *supra* note 37, at 30-49 (Follett lecture on "Constructive Conflict," advocating the use of integrative bargaining to resolve conflicts). *See also supra* note 32.

synergistic dynamic that this interdependence and difference could create. Her ideal of the individual, therefore, was of the “self” working in synergistic relation *with* the “other” to expand outcomes beyond the bounds of the limitations originally perceived by each in order to achieve social progress for both, and ultimately for society as a whole.

V. CONCLUSION

The central reformative focus of the heuristic framework suggested in this Article is part of a larger, ongoing project that addresses the important and legitimate “justice-centered” critiques that have been leveled at the ADR movement since its institutionalization within the U.S. legal system began.²²¹ This need to answer calls to reform aspects of ADR practice has parallels in the history of other forms of alternative justice—such as in the calls heard from the eighteenth and nineteenth centuries to reform the system of equity jurisdiction in England after centuries of its institutionalization as an alternative to common law justice.²²² This Article focuses on filling aspects of that need during what is still the early stage of our legal system’s institutionalization of ADR. The spirit of reform that first inspired the movement has now taken on a life of its own within the legal profession as the practice of ADR is increasingly becoming viewed as central to the practice of law.²²³ It is therefore particularly important for members of the

²²¹ See generally SANCHEZ, NEGOTIATING THE 21ST CENTURY, *supra* note 34.

²²² See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 268 (Garland Publishing Co. 1978) (9th ed. 1783) (“Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected.”); CHARLES DICKENS, BLEAK HOUSE 2 (Oxford 1989) (1853) (concerning the notorious delays encountered in processing lawsuits in equity through the Court of Chancery: “Never can there come a fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds, this day, in the sight of heaven and earth”).

²²³ This transformation of the ADR landscape twenty-five years after the Pound Conference of 1976 was the subject of a recent symposium held at the Ohio State University Moritz College of Law in November, 2001. See L. Camille Hebert, *Introduction—The Impact of Mediation: 25 Years After the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 527, 527–28 (2002); Lisa A. Kloppenberg, *Implementation of Court-Annexed Environmental Mediation: The District of Oregon Pilot Project*, 17 OHIO ST. J. ON DISP. RESOL. 559, 559–61 (2002); Lela Porter Love, *Twenty-Five Years Later with Promises to Keep: Legal Education in Dispute Resolution and Training of Mediators*, 17 OHIO ST. J. ON DISP. RESOL. 597, 598 (2002); Dorothy J. Della Noce,

bar and other professionals who engage in the practice of ADR, as well as for scholars who study it and educate its future practitioners, to do so with a sense of its twentieth century law reform aspirations as well as its more ancient heritage dating as far back as the Anglo-Saxon dispute processing continuum, rooted in the earliest period of English legal history.²²⁴ Preserving the integrity of ADR into the future as an integral part of the contemporary dispute processing continuum will depend upon the ability of its participants to negotiate both justice and human needs.

Mediation Theory and Policy: The Legacy of the Pound Conference, 17 OHIO ST. J. ON DISP. RESOL. 545, 547 (2002); Robert W. Rack, Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 609, 609 (2002); Joseph B. Stulberg, *Questions*, 17 OHIO ST. J. ON DISP. RESOL. 531, 531 (2002); Douglas A. Van Epps, *The Impact of Mediation on State Courts*, 17 OHIO ST. J. ON DISP. RESOL. 627, 627 (2002); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What we Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 641 (2002); see also Judge Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 OHIO ST. J. ON DISP. RESOL. 1, 1–3 (2001).

²²⁴ See Sanchez, *Towards a History of ADR*, *supra* note 1, at 33–39. The broad spectrum of that historical continuum is the subject of an extensive, multi-volume work-in-progress. See VALERIE A. SANCHEZ, *THE HISTORY OF ADR IN THE ANGLO-AMERICAN LEGAL SYSTEM* (multi-volume work-in-progress) (on file with the author).